



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

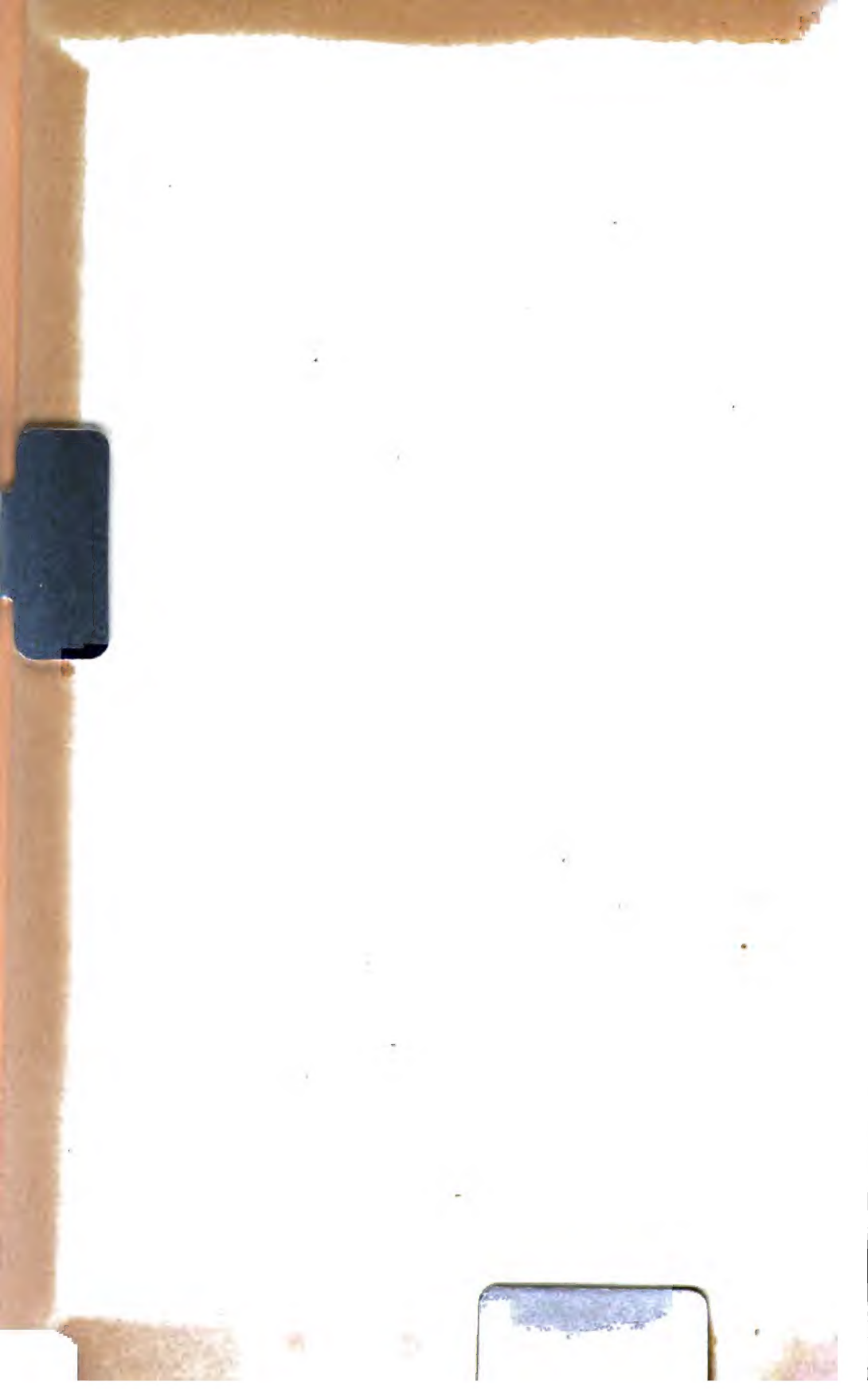
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



JSN
JAD
MFH

V.3





REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, F. FISHER, AND H. CADMAN JONES,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

VOL. III.

1860-1861.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1873.

a. 55372

JUL 8 1901

Entered according to Act of Congress in the year 1878, by

LITTLE, BROWN, AND COMPANY,

In the Office of the Librarian of Congress, at Washington.

CAMBRIDGE:

PRESS OF JOHN WILSON AND SON.

LORD CAMPBELL, LORD CHANCELLOR.

SIR JOHN ROMILLY, MASTER OF THE ROLLS.

SIR JAMES LEWIS KNIGHT BRUCE,
SIR GEORGE JAMES TURNER, } LORDS JUSTICES.

SIR RICHARD TORIN KINDERSLEY,
SIR JOHN STUART, } VICE-CHANCELLORS.
SIR WILLIAM PAGE WOOD,

SIR RICHARD BETHELL, ATTORNEY-GENERAL.

SIR WILLIAM ATHERTON, SOLICITOR-GENERAL.



A TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

[THE NUMERALS REFER TO THE MARGINAL PAGES.]

	Page
Aberystwith & Welch Coast Railways, <i>In re</i>	201
Ackroyd, <i>Ex parte</i> , <i>In re</i> Cheeseborough, <i>In re</i> Haigh	727
Agriculturist Cattle Insurance Company, <i>In re</i>	194
Anchor Reversionary Company, Marriott <i>v.</i>	177
Atkinson <i>v.</i> Barton	339
Austria (Emperor of) <i>v.</i> Day and Kossuth	217
Baker, Marchioness of Londonderry <i>v.</i>	701
Bank of England's Case, <i>Ex parte</i> , M'Kenna, <i>In re</i> Laurence	645
Bankart, Houghton <i>v.</i>	16
Barlow, Broadbent <i>v.</i>	570
Barrett, Saltmarsh <i>v.</i>	279
Barton, Atkinson <i>v.</i>	339
Bates, Beaufort (Duke of) <i>v.</i>	381
Beaufort (Duke of) <i>v.</i> Bates	381
Benham <i>v.</i> Keane	318
Blanchard, <i>In re</i>	131
Boyce, <i>In re</i> , <i>Ex parte</i> Tomlinson	745
Brennard's Patent, <i>In re</i>	695
Broadbent <i>v.</i> Barlow	570
Budd's Case	297
Cardiff and Caerphilly Iron Company, Limited, <i>In re</i> Gledhill's Case	713
Case <i>v.</i> James	256
Chambres, Norris <i>v.</i>	583

	Page																		
Chaninel, <i>Ex parte</i> , <i>In re</i> Nicholson	747																		
Charlton v. West	156																		
Cheeseborough, <i>In re</i> , <i>Ex parte</i> Ackroyd	727																		
Chester and Holyhead Railway Company, Hughes v.	352																		
City Bank Case, <i>Ex parte</i> M'Kenna, <i>In re</i> Laurence	629																		
Clarke, Clayton v.	682																		
Clayton v. Clarke	682																		
Clerkenwell (The Vestry of The Parish of St. James and St. John), Ecclesiastical Commissioners for England v.	688																		
Cockburn v. Peel	170																		
Cockerell, Wall v.	737																		
Coe, <i>Ex parte</i> , <i>In re</i> District Savings Bank	335																		
Cooper, Green v.	58, 271																		
Cook v. Dawson	127																		
Crocker, Waine v.	421																		
Cust v. Middleton	83																		
Dawson, Cook v.	127																		
Day and Kossuth, Emperor of Austria v.	217																		
Dean, <i>In re</i> , <i>Ex parte</i> Mellor	760																		
Denby, <i>In re</i>	350																		
District Savings Bank, <i>In re</i> , <i>Ex parte</i> Coe	335																		
Dover Harbour, Warden, &c., of v. London, Chatham, and Dover Railway Company	559																		
Drake v. Symes	491																		
Draper v. Manchester, Sheffield, and Lincolnshire Railway Company	23																		
Duff, Gordon v.	662																		
Dyke v. Taylor	467	 		Early, Townsend v.	1	Ecclesiastical Commissioners for England v. The Vestry of the Parish of St. James and St. John, Clerkenwell	688	Elwes v. Elwes	667	Emperor of Austria v. Day and Kossuth	217	 		Fletcher v. Fletcher	775	Ford v. Tennant	697	Freeman v. Pennington	295
Early, Townsend v.	1																		
Ecclesiastical Commissioners for England v. The Vestry of the Parish of St. James and St. John, Clerkenwell	688																		
Elwes v. Elwes	667																		
Emperor of Austria v. Day and Kossuth	217																		
Fletcher v. Fletcher	775																		
Ford v. Tennant	697																		
Freeman v. Pennington	295																		

TABLE OF CASES REPORTED.

vii

	Page
Freston, <i>Ex parte</i> , and <i>In re</i>	612
Frogley v. Phillips	466
Gallagher, Johnson v.	494
Garland, <i>Ex parte</i> , Randfield v. Randfield	768
Gledhill's Case	713
Gordon v. Duff	662
Green, Cooper v.	58, 271
Greenhill, Knowles v. (Heath v. Greenhill)	713
Gresley v. Mousley	433
Haigh v. Haigh	157
Haley v. Hammersley	587
Hammersley, Haley v.	587
Hankey, Ponsford v.	544
Harrison, Newby v.	287
Heath v. Greenhill (Knowles v. Greenhill)	713
Houghton v. Bankart	16
Hughes v. Jones	307
Hughes v. Chester and Holyhead Railway Company	352
James, Case v.	256
Jenner v. Morris	45
Johnson v. Gallagher	494
Jones, Hughes v.	307
Jones, Shepherd v.	56
Keane, Benham v.	318
Kernot v. Potter	447
Kidd, <i>Ex parte</i> , and <i>In re</i>	640
Knowles v. Greenhill (Heath v. Greenhill)	713
Kynaston, Norman v.	29
Lane, Perfect v.	369
Laurence, <i>In re</i> , City Bank Case	629
Bank of England's Case	645
Leeming, <i>In re</i>	43

	Page
Lees <i>v.</i> Massey	113
Lethbridge <i>v.</i> Lethbridge	523
Life Association of Scotland <i>v.</i> Siddall (<i>Cooper v. Green</i>)	58, 271
London, Chatham, and Dover Railway Company, Dover Harbour, Warden, &c., of <i>v.</i>	559
Londonderry, Marchioness of <i>v.</i> Baker	701
 Maclaren <i>v.</i> Stainton	 202
M'Kenna, <i>Ex parte</i> , <i>In re</i> Laurence, City Bank Case	629
M'Kenna, <i>Ex parte</i> , <i>In re</i> Laurence, Bank of England's Case	645
Manchester, Sheffield, and Lincolnshire Railway Company, Draper <i>v.</i>	23
Marchioness of Londonderry <i>v.</i> Baker	701
Marriott <i>v.</i> The Anchor Reversionary Company	177
Massey, Lees <i>v.</i>	113
Matthews, Smith <i>v.</i>	139
Mellor, <i>Ex parte</i> , <i>In re</i> Dean	760
Middleton, Cust <i>v.</i>	33
Morgan, Walters <i>v.</i>	718
Morris, Jenner <i>v.</i>	45
Mortimore, <i>Ex parte</i> , and <i>In re</i>	599
Mousley, Gresley <i>v.</i>	433
 Newby <i>v.</i> Harrison	 287
Newstead, Ridgway <i>v.</i>	474
Nicholson, <i>In re</i>	93
Nicholson, <i>In re</i> , <i>Ex parte</i> Chaninel	747
Norris <i>v.</i> Chambres	583
Norman <i>v.</i> Kynaston	29
 Oldfield <i>v.</i> Preston	 398
 Parbury's Case	 80
Parmiter <i>v.</i> Parmiter	461
Pell's Trusts, <i>In re</i>	291
Pell, Cockburn <i>v.</i>	170
Pennington, Freeman <i>v.</i>	295
Perfect <i>v.</i> Lane	369
Phillips, Frogley <i>v.</i>	466

TABLE OF CASES REPORTED.

ix

	Page
Polson, Sheerness, &c., Co. v.	36
Pomfret, Selby v.	595
Ponsford v. Hankey	544
Potter, Kernot v.	447
Preston, Oldfield v.	898
 Randfield v. Randfield (<i>Ex parte</i> Garland)	766
Ridgway v. Newstead	474
 Saltmarsh v. Barrett	279
Selby v. Pomfret	595
Shepherd v. Jones	56
Sheerness Well or Waterworks Company v. Polson	36
Siddal, Life Association of Scotland v.	58, 271
Skottowe v. Williams	585
Smith v. Matthews	139
Stainton, Maclaren v.	202
Symes, Drake v.	491
 Taylor, Dyke v.	467
Tennant, Ford v.	697
Tomlinson, <i>Ex parte</i> (<i>In re</i> Boyce)	745
Townsend v. Early	1
Turquand, Whitmore v.	107
 Waine v. Crocker	421
Wall v. Cockerell	737
Walters v. Morgan	718
Ward, <i>In re</i>	700
Warwick and Worcester Railway Company, <i>In re</i> , Parbury's Case	80
Way, <i>In re</i>	175
Wellington (Duke of), <i>Ex parte</i>	13
West, Charlton v.	156
Whitmore v. Turquand	107
Williams, <i>In re</i>	104
Williams, Skottowe v.	585
Witham v. Witham	758
Wood, <i>In re</i>	125

[THE NUMERALS REFER TO THE MARGINAL PAGING.]

A.	Page	Atty.-Gen. v. Cradock	Page
Abeel v. Radcliff	139	v. Great Northern Rail- way Co.	563
Adams v. Claxton	580	v. Grote	662, 664
v. Paynter	698	v. Malkin	281
Affalo v. Fourdrinier	83	v. Nichol	228
Agnew v. Pope	29	v. Parkin	663
Aguilar v. Aguilar	514	v. Sheffield Gas Con- sumers Co.	228, 467
Aitkin, <i>In re</i>	134	v. Yelverton	409, 411
Albert Prince v. Strange	225, 228	Attwood v. Small	474, 737
Aldborough, Earl of v. Trye	369, 372, 376	Australian Mail Company Case	183
Aldrich v. Cooper	580	Austria, Emperor of v. Day	239
Allan v. Gomme	357	Averill v. Loucks	659
Allen v. Houlden	698	Aylett v. Ashton	502, 515
v. Papworth	506, 518	Ayre's Case	716
Alston, <i>Ex parte</i>	570		
Amory v. Fairbanks	474		
Anderson v. Hampton	618		
v. Wallace	161, 168		
Andrews v. Wrigley	70		
Anon. 4 De G., M. & G. 872	750		
18 Ves. 258	506, 519, 520		
Anson v. Hodges	310		
Archer v. Hudson	540		
Arcof, Nabob of v. East India Co.	226		
Arding v. Flower	618		
Arms v. Ashley	139		
Armstrong, <i>Ex parte</i>	175		
v. Burnett	208		
Ashley v. Ashley	343		
Astbury, <i>Ex parte</i>	587		
Aston's Case	306		
Atkins v. Allen	202		
Atkinson v. Parker	296		
Att.-Gen. v. Cambridge Consum- ers' Gas Co.	467		
v. Cooper	493		

	Page		Page
Barrell v. Joy	151	Boyle, <i>In re</i>	100
Barrow v. Barrow	145, 271	Boys v. Williams	663, 665
Bartholomew, <i>Ex parte</i>	779	Bradley v. Barlow	115
Bartley v. Bartley	25	Bradshaw, <i>Ex parte</i>	126
Barton's Trust, <i>In re</i>	202, 215	Brander v. Brander	206
Bass v. Gilleland	315	Braybroke's, Lord, Case	402, 408, 410
Bassett v. Salisbury Manuf. Co. and Salisbury Mills	473	Breadalbane, Marquis of v. Chan- dos, Marquis of	673
Bateman v. Freston	614	Breachcliff v. Dorrington	259
Bates v. Mackinley	202	Brewer v. Swirles	70
Battishill v. Reed	18	Brice v. Stokes	70
Bayley, <i>Ex parte</i>	599	Briden v. Hewlett	115, 779
Baynard v. Woolley	262	Bridgett v. Hames	259, 270
Beaumont v. Bramley	673	Bridgman, <i>In re</i>	134
Beavan v. Oxford, Lord	322, 325	Briggs, <i>Ex parte</i>	701
Beckford v. Wade	482	British Linen Co. v. Drummond	642
Beckham v. Drake	635	Broadbent v. Thornton	108
Bedington v. Southall	157	Bromley v. Holland	230
Beever v. Luck	595	Brooke v. Washington	659
Behrens v. Sieveking	707	Brooks v. Jobling	157
Bein v. Heath	287	v. Marbury	107
Bellamy v. Hill	292	Broom v. Broom	653
Bennett v. Merriman	292	Brown's Case	769
Berkeley v. Swinburne	292	Brown v. Bellows	157
Berne, City of v. Bank of Eng- land	223	v. Cross	69
Berridge, <i>Ex parte</i>	597	v. Gellatly	202
Bethune v. Kennedy	663	v. Sawyer	493
Biddulph, <i>Ex parte</i>	580	Bruere v. Pemberton	506
v. Camoys, Lord	157	Brunswick Co. v. Muggeridge	716
Bigelow v. Hartford Bridge Co.	567	Brunswick, Duke of v. Hanover, King of	222
Bignall v. Gale	161, 162	Buchan v. Sumner	659
Bignold, <i>Ex parte</i>	580, 596	Buckeridge v. Glasse	74
<i>In re</i>	99	Buckingham, Duke of v. Bucking- ham, Duchess of	428
v. Audland	57	Bulger v. Roche	640
Birch's Case	716	Bullock v. Downes	115, 118, 120
Bird v. Luckie	115, 117, 118	Bullpin v. Clarke	501, 502, 510
Biron v. Mount	108	Bunnel v. Taintor	658
Bishop v. Bishop	171	Burgess v. Burgess	351
Black v. Black	658	Burke v. Tuite	506, 514
v. Creighton	288	v. Wilder	1
Blackborn v. Edgley	528	Burn, <i>Ex parte</i>	763, 764
Blake v. Nutter	658	Burnett, <i>Ex parte</i>	750
Bolton, <i>Ex parte</i>	764	v. Chetwood	238
Bolton, Duke of v. Williams	511, 512, 513, 518	Burnside v. Merrick	659
Bond v. Hopkins	289	Burrows v. Walls	74
Bonnardet v. Taylor	25	Bushell v. Bushell	324
Bonney v. Ridgard	482, 484	Butler's App.	718
Bonomi v. Backhouse	20	Butler v. Cumpston	494, 515
Booth v. Leycester	428	v. Lowe	7
Boothby v. Boothby	374	Butterfield, <i>In re</i>	134
Boston Water Power Co. v. Gray	157, 166	Byrne v. Crowninshield	640
Bottomley v. Nuttall	635		
Bowditch v. Soltyk	10		
Boyd v. Shorrock	587		
Boydell v. Drummond	311		

C.

Cable v. Cable	115
Cadman v. Horner	309

	Page		Page
Carnatic, Nabob of the v. East India Company	222	Cowgill, <i>In re</i>	617
Carr's Trusts, <i>In re</i>	271	Cox v. Cox	202
Carter, <i>Ex parte</i>	597	Creed v. Creed	663
v. Cropley	694	Crocker's Case	428
v. Palmer	443	Crocker v. Waine	427, 428, 429, 430
Chapple's Case	82, 92	Cruger v. Cruger	494
Charmer v. Bradley	540	Cullum v. Emanuel	474
Child v. Douglas	467, 473.	Curtis v. Engel	494
Chinnock's Case	302		
Christie v. Dowling	642		D.
Christman v. Moran	157		
Chuck v. Freen	633, 634, 638	Da Costa v. Keir	759
Church v. Mundy	769	Daland v. Williams	202
Circuit v. Perry	209	Dale v. Hamilton	147, 151
Clache's Case	343, 344, 347, 348, 349	Dallas v. Floyd	69
Clapton v. Bulmer	115	Dalton, <i>In re</i>	615
Clark v. Reins	315	Dand v. Kingscote	357
Clarke v. Freeman	227, 228, 230, 240, 241	Darbey v. Whitaker	455
Clarkson v. Clarkson	202	Darby v. Boucher	49
Clayton v. Lowe	760	v. Darby	653
Clegg v. Dearden	20	v. Harris	589
v. Edmondson	74, 474, 482	Davies v. Nicolson	481, 483
Clerk v. Miller	511	v. Price	157
Cleveland v. Burrell	583	Davis v. Battine	108
Clive v. Beaumont	309	v. Christian	659
v. Carew	503	v. Jones	589
Cloudsley v. Pellham	128	v. Marlborough, Duke of	372
Cockerell v. Barber	351	v. Thomas	556
Coggs v. Bernard	182, 186	v. Strathmore	321, 324, 326, 327, 331
Coleman v. West Hartlepool Railway Co.	23, 25	Dawson v. Clarke	282
Coles v. Bank of England	580	Dean v. Dalton	281
v. Sims	535, 737	Deare v. Soutten	45
Collard v. Sampson	127	De Caters v. Chaumont	107
Collier v. Jenkins	310, 311	Dedham Bank v. Richards	107
Collins v. Reece	108	Deffis v. Goldschmidt	6
Collins Co. v. Brown	225	De Forrest v. Bacon	107
v. Cowen	225	De Gendre v. Kent	202
Columbian Government v. Rothschild	223	Delmonico v. Guillaume	659
Colyer v. Finch	259, 260, 262	De Mattos v. Gibson	180, 181
Conrad v. Massasoit Ins. Co.	157, 168	De Mattos, Chevalier, <i>Ex parte</i>	763
Cook v. Bath	567	De Montmorency v. Devereux	535
Cooke v. Setree	100	De Pass's Case	302
Cookney's Case	716	Derbyshire v. Home	70
Cookson v. Cookson	653	Devaynes v. Robinson	489
v. Hancock	31	Devonshire v. Newenham	228
Coombes v. Brookes	131	Dewdney, <i>Ex parte</i>	763, 764
Cooper v. Cooper	760	De Witt v. Yates	12
v. Greene	59, 66, 67, 76, 78	Dickson, <i>In re</i>	100
v. Lewis	706	Dilkes v. Broadmead	481, 483, 488
Cornell v. Warren	707	Dillon v. Grace	510, 516
Cory v. Eyre	264	Dix v. Reed	351
Costello's Case	297, 302	Dixon v. Holden	241
Costar v. Clarke	658	Doddington v. Hudson	160
v. Murray	659	Doe v. Alsop	323
		v. Bevan	471, 472
		v. Church-wardens of Rugby	471

	Page		Page
Doe v. Gladwin	472	Errington v. Attorney-General	57
v. Harrison	472	Erskine's Trust, <i>In re</i>	145
v. Hicks	31	Etty v. Bridges	268
v. Hutton	769	European and Australian Royal	
v. Jenney	770	Mail Co. v. Royal Mail Steam	
v. Jones	472	Packet Co.	180, 181, 185
v. Lawes	770	Evans v. Bremridge	47
v. Peck	472	v. Prothero	461, 464, 465
v. Tomkins	769	Eyre v. M'Dowell	325
v. Willets	528		
v. Woodbridge	472		
Don v. Lippmann	640, 642, 643	F.	
Donaldson v. Haldane	443	Fall River Whaling Co. v. Bor-	
Dormay v. Borradaile	129	den	658, 659
Dornford, <i>Ex parte</i>	604	Farina v. Silverlock	226, 230, 243
Douglas v. Forrest	643	Farquharson v. Pitcher	289
Downes v. Bullock	115, 116	Farrar v. Stackpole	587
Dubost v. Beresford	238	Farrow v. Vansittart	357, 358
Dudley v. Littlefield	658	Fawcett v. Whitehouse	209
Duffield v. Duffield	31	Feltham v. Clark	180, 181
Duffy's Trust, <i>In re</i>	277	Fenwick's Case	301
Duncan v. Duncan	50	Field v. Donoughmore, Lord	108
Dunch v. Kent	108, 110, 112	v. Sowle	502, 503, 510, 518, 520
Dunkley v. Dunkley	271	Finch v. Hattersley	128, 130
Durham and Sunderland Railway		Fisher v. Dixon	589, 595
Company v. Walker	357, 358	Fitter v. Beale	20
Dyer v. Clark	659	Fitzgerald, <i>In re</i>	175
Dyett v. North American Coal		Flint v. Warren	779
Co.	494	v. Woodin	310
		Fluid v. Fluid	170
E.		Folliott v. Ogden	227, 229
Eakin v. Shumaker	659	Fonnereau v. Poyntz	663, 664
Earle v. Peale	49	Forbes v. Limond	108
Earp's Case	202	Ford v. Fleming	663
Early v. Benbow	4, 11	v. Ford	117
v. Middleton	4	Forde v. Heriatt	659
Eastman v. Amoskeag Manuf. Co.	473	Forster v. Hale	148, 150
East and West India Docks, &c.		Foster v. Hodson	482
v. Gattke	569	Fowler v. Fowler	673
Edwards v. Browne	372	Fox v. Fox	216
v. Burt	369, 372, 373, 380	v. Mackreth	721, 723
v. Edwards	759	v. Newstead	477, 479, 481, 488
Eggington's Case	619, 620, 626	Franco v. Franco	262, 269, 270
Elcock v. Mapp	282	Free, <i>Ex parte</i>	652
Ellicombe v. Gompertz	343	Freeman v. Fairlie	274
Elliott v. Bishop	589	v. Lomas	209
v. Cordell	274	Freen, <i>Ex parte</i>	633
Elmhirst v. Spencer	467	Freeport v. Bartol	139
Ely, Dean of v. Caldecot	770	Fryer v. Shaw	157
Emery v. Owings	168	Fuller v. Knight	262
v. Wase	161		
Emly, <i>Ex parte</i>	633	G.	
v. Lye	633, 638	Gaines v. Catron	659
Equitable Assurance Company v.		Galland v. Leonard	760
Fuller	171	Gardner v. Gardner	494
Ernest v. Vivian	474		

INDEX OF CASES CITED.

XV

	Page		Page
Garomer v. Cazenove	180	Hartley v. Allen	208
Garrard v. Lauderdale, Lord	108	Harvey v. Cooke	209
Garrett v. Handley	635	v. Shelton	161
Gaston v. Frankum	309	Hastie's Case	80
Gee v. Pritchard	227, 239	Hatch v. White	474
Gervais v. Edwards	447	Hawkins, <i>Ex parte</i>	616, 618
Gibbons v. Board of Management of North Eastern Metropolitan Asylum District	310	v. Gathercole	325
Gillespie v. Alexander	481, 483	Hayden v. Stone	58
Gilman v. Andrews	51	Hickling v. Boyer	209
Glasse v. Richardson	770	Hinde, <i>Ex parte</i>	44
Goldsmid v. Cazenove	761, 764	Hinds, <i>Ex parte</i>	652
Goodburn v. Stevens	659	Hipkins v. Amery	597
Gorbell v. Davison	116	Hirst v. Tolson	49, 58
Goring v. Warner	471	Hearle v. Hicks	29
Gosling's Case	322	Heasman v. Pearce	291
Gourlay v. Somerset, Duke of	455	Heatley v. Thomas	502, 503, 510, 517, 518
Grabowski's Settlement, <i>In re</i>	202	Hellawell v. Eastwood	589
Grace v. Bishop	618	Hemming, <i>In re</i>	643
Graham v. Birkenhead, &c. Rail- way Co.	535, 737	Henderson v. Cook	706
Gray v. Hill	107	Hennessey v. Bray	58
v. Palmer	658	Hewett v. Laycock	162
Greatley v. Noble	506, 514	Hodgson v. Clarke	462
Great Western Railway Co. v. Ox- ford, &c. Railway Co.	535	v. Smithson	293
Green v. Norton	275	Hodsoll v. Stallebrass	20
Greenough v. Shorrook	494	Hodson's Case	137
Greenshield's Case	83, 92	Hodson v. Ball	707
Gregg v. Wells	580	Holford v. Wood	12
Gregory v. Gregory	482, 484, 485	Holkirk v. Holkirk	493
Greig v. Somerville	481, 483	Hollingsworth v. Shakeshaft	706
Gresley v. Mousley	433	Holloway v. Holloway	117, 118
Gretton v. Leyburne	100	Holman v. Loynes	443
Grimstone, <i>Ex parte</i>	175	Holmes v. Turner	596
Grisewood and Smith's Case	306	Holyoake v. Shrewsbury and Bir- mingham Railway Co.	562
Grosvenor, Earl v. Hampstead Junction Railway Co.	528	Home v. Pillans	760
Grugeon v. Gerrard	597	Hooper v. Lane	615, 619, 620, 626
Gundry v. Pinniger	115, 117	v. Rossiter	202, 207
Gunnis v. Erhart	811	Hopcraft v. Hickman	161
		Horlock v. Smith	100, 440
H.		Hornby, <i>Ex parte</i>	763, 764
Hall v. Hancock	1	Hosking v. Nicholls	663
v. Smith	311	Houghton v. Houghton	653
Halsey v. Whitney	107	Houston v. Nowland	107
Hames v. Hames	282	Howard v. Priest	659
Hamilton v. Marks	57	Hoxie v. Carr	659
Hanson v. Stevenson	472	Hubbard v. Bagshaw	589
Harcourt v. Harcourt	293	Hudson v. London and South Western Railway Co.	528
Harris, <i>Ex parte</i>	653	Hughes v. Lumley	323
v. Lee	46, 48, 52	v. Wells	517
v. Tyson	718	v. Williams	180, 181
Harrison v. Hollins	69	Hullett v. King of Spain	223
v. NettleSHIP	47	Hulme v. Hulme	31
		v. Tenant	494, 502, 510, 511, 512, 513, 518, 519
		Hunt v. Benson	659
		Hunter, <i>Ex parte</i>	735

	Page		Page
Hunter v. Martin	659	King's Case	297
Hutchinson v. Kay	589	King, <i>Ex parte</i>	616, 618
v. Tindall	151	v. Denison	31
v. Underwood	494	v. Oundle, Lord of Manor	
Hyam's Case	297, 301, 302, 306	of	770
		v. Walker	643
I.		Kingston, Earl of, <i>In re</i>	175
Ibbotson v. Elam	202	Kinmouth v. Brigham	202
Imperial Gas Light and Coke Com-		Kintzing v. McElrath	718
pany v. Broadbent	563	Kirkman's Trust, <i>In re</i>	292, 295
Ingraham v. Kirkpatrick	107	Kiver v. Oldfield	29
Irish Peat Company v. Phillips	716	Knight v. Bowyer	58, 311
Irving v. Richardson	180, 181	Knott, <i>Ex parte</i>	597
		Knowles v. McKamley	494
J.		Knowlton v. Mickles	168
Jackson v. Rowe	581	Knox v. Bushell	49, 53
Jaques v. Methodist Episcopal		Kotchner v. Short	315
Church	494		
Jarvis v. Brooks	659	L.	
Jefferies v. Boosey	227, 241	Lachlan v. Reynolds	309
Jeffrey v. Tozer	684	Lacy v. Waring	659
Jenkins v. Eldredge	151	Laidlaw v. Organ	718
Jenkinson, <i>In re</i>	409, 411, 414	Lampman v. Milks	587
Jenner v. Jenner	673	Lane v. Ewing	151
Johns v. Mason	309	v. Husband	108
Johnson, <i>Ex parte</i>	604, 607, 618, 735	Lanfair v. Sumner	332
v. Cummins	494	Langdale, Lady v. Briggs	474
v. Holdsworth	323, 324, 333	Langton v. Horton	180, 181
v. Kershaw	108	Lansing v. Goelet	474
v. Johnson	207	Larabrie v. Brown	57
v. Machielsen	227	Lassence v. Tierney	29, 31
v. Vail	494	La Touche v. Lucan, Earl of	107
Jolland v. Stainbridge	326	Lawes v. Purser	454
Jones v. Colbeck	115, 117, 119, 122,	Lawless v. Mansfield	433
	124	Lawrence v. Smith	227
v. Creveling	12	Lawton v. Ward	357
v. Harris	500, 513, 514	Leake v. Robinson	7, 120
v. Mossop	209	Lee v. Green	321
v. Shepherd	56	v. Lee	117, 118
v. Smith	180, 183	Leeds, Duke of v. Amherst, Lord	68, 70
Joy v. Birch	555	Leeming v. Sherratt	120
Joyce v. De Moleyns	260	Legrand v. Whitehead	310
		Leigh, <i>Ex parte</i>	614, 615, 618
K.		Leland v. Hayden	202
Kekewick v. Manning	260	Le Neve v. Le Neve	321, 324, 325, 331
Kenge v. Delavall	511	Lerned v. Wannemacher	151
Kenny v. Udall	277	Le Roy v. Crowninshield	640
Kensington, Lord v. Mansell	770	Le Texier v. Anspach, Margra-	
Kenyon v. Levi Solomon	618	vine of	556
Kerswill v. Bishop	180	Lewes v. Morgan	438, 440, 442, 443,
Kidd v. North	31		444
Kimball v. Keyes	51	Life Association of Scotland v.	
		Siddal	58, 272, 535, 737
		Lindgren v. Lindgren	663, 665
		Livesey v. Harding	259, 344
		Livingston v. Peru Iron Co.	718

	Page		Page
London & North Western Rail- way Co. v. Smith	569	Mickles v. Thayer	166
Love v. Gaze	284	Mills v. Brown	668
Lovell v. Leland	474	v. The Society of Bowyers	19
Ludlow v. Cooper	658	Milnes v. Busk	512
Lumsden v. Fraser	698	v. Gery	455
Lupton v. White	182	Minot v. Paine	202, 215
Lyddon v. Moss	73	Moggridge v. Thackwell	12
Lynam v. Cottree	309	Molony v. Kernan	47
Lyon v. Coward	292	Monk v. Sharp	750
v. MacLay	58	Montmorency v. Devereux	443
		Moody v. King	769
		Moore, <i>Ex parte</i>	616, 620, 621
		v. Platel	157
		More's, Sir W., Case	472
		Mores v. Huish	510, 512, 513
		Morgan v. Evans	438
		Morris v. Barrett	652
		Morse v. Ormonde, Lord	343
		Mortimer v. Picton	170
		Morton v. Tewart	147, 151
		Moses v. Levi	489
		v. Murgatroyd	107
		Moss v. Dunlop	779
		Mountstephen v. Brooke	464
		Moxen v. Bright	447
		Mullins v. Smith	663
		Munch v. Cockerell	68
		Murray v. Barlee	500, 514
		v. Palmer	721
		Musgrave and Hart's Case	297
		Myers v. Watson	721
		N.	
		Nail v. Punter	517, 520
		Nalder v. Hawkins	684
		Nantes v. Corrock	501, 520
		Naylor v. Collinge	386
		Neate v. Marlborough, Duke of	327,
			333
		Newbold v. Roadnight	663
		Newborn v. Bronson	583
		New England Bank v. Lewis	107
		Newlands v. Painter	327
		Nicholson v. Gooch	750
		v. Nicholson	209
		v. Tutin	108, 112
		Nicklin v. Williams	20
		Nicoll v. Mumford	107
		North British Railw. Co. v. Todd	562,
			563
		North Eastern Railw. Co. v. Mar-	
		tin	458
		Norton, <i>Ex parte</i>	751
		v. Turvill	510, 517
		Nugent v. Giffard	488

O.		Page		Page
Ockford v. Freston		614	Pierpont v. Graham	107
Ogden v. Fossick		447	Pinchin v. London and Blackwall Railway Co.	473
Ogle's Case	616,	618	Pinnock v. Clough	151
Omaly v. Swan		474	Pitts v. Waugh	658
Orm v. Smith		663	Place v. Fagg	589
Ormes v. Beadel		535	Plenderleath v. Fraser	100
Oswald v. Grey, Earl		160	Plews and Middleton, <i>In re</i>	162
Owens v. Collins		659	Plumbe v. Neild	207, 209
v. Dickenson	500, 503, 509, 514, 518, 519		v. Plume	556
Oxenden v. Compton, Lord		44	Poole's Case	589
P.			Potter v. Crossley	310
Page v. Adam		488	Powell v. Peach	71
v. Ranstead		157	Powles v. Hargreaves	726, 735
Paine v. Drew		640	Pratt v. Pratt	202
Paris v. Paris		206	Prescott v. Wright	718
Parkes v. White		513	Preston v. Melville	208
Parnell, <i>Ex parte</i>		700	Price's Case	615
<i>In re</i>		701	Price v. Anderson	206
Partington v. Reynolds		707	Pride v. Fooks	344
Partridge v. Usborne		707	Primrose, <i>In re</i>	134
Patrick, <i>In re</i>		175	Proctor v. Cooper	320
Patterson v. Grace		658	v. Williams	168
Peacock v. Evans		374	Prothero v. Phelps	428
v. Monk		510	Protheroe v. Forman	741
Pearce v. Pearce		58	Pugh, <i>In re</i>	500
v. Vincent	116, 118		v. Currie	659
Pearsell v. Dwight		640	Pye, <i>Ex parte</i>	260
Peck v. Fisher		659	R.	
Pegg v. Wisden		556	Rabbeth v. Squire	344, 348, 349
Pemberton, <i>Ex parte</i>		101	Rackham v. Siddal	60, 65, 69, 77
Penn v. Baltimore, Lord	583, 584		Raffety v. King	69
Penny v. Clarke	291, 292, 293		Ramsay's Settlement, <i>In re</i>	403, 411
Penton v. Robart		589	Randall v. Randall	653
Pepper v. Gorham		160	Randfield v. Randfield	760
Perfect v. Stockwell		370	Rankin v. Duryer	107
Perkins v. Ede		311	Raworth v. Parker	108
Perry v. Holl	581, 741, 743		Rawson v. Haigh	47
Pettward v. Pettward		663	Rayner v. Mowbray	117
Petway v. Powell		1	Read v. Head	202
Phelps v. Prothero		47	Reed v. Devaynes	351
Phillips v. Phillips	455, 653		Regina v. Sharpe	562
Phillipson v. Gatty		71	Reid v. Shergold	540
Philpot v. Hoare		472	Reinhard v. Bank of Kentucky	107
Phipard v. Mansfield		344	Reyner v. Mowbray	115
Phoenix Bank v. Sullivan		107	Rice v. Rice	261, 262
Phyper v. Eburn		769	Richardson v. Miller	684
Piatt v. Oliver		659	Ricketts v. Harling	202, 215
Picard v. Hine		494	Rider v. Wood	769
Pickard v. Sears	580, 581		Ridges v. Morrison	12
Piddock v. Brown		440	Rigby v. Great Western Railw. Co.	562
Piddocke v. Smith		157	Roberts, <i>In re</i>	175
Pierce v. Perkins		168	v. McCarty	659
v. Trigg		659	Robinson v. Lowater	128

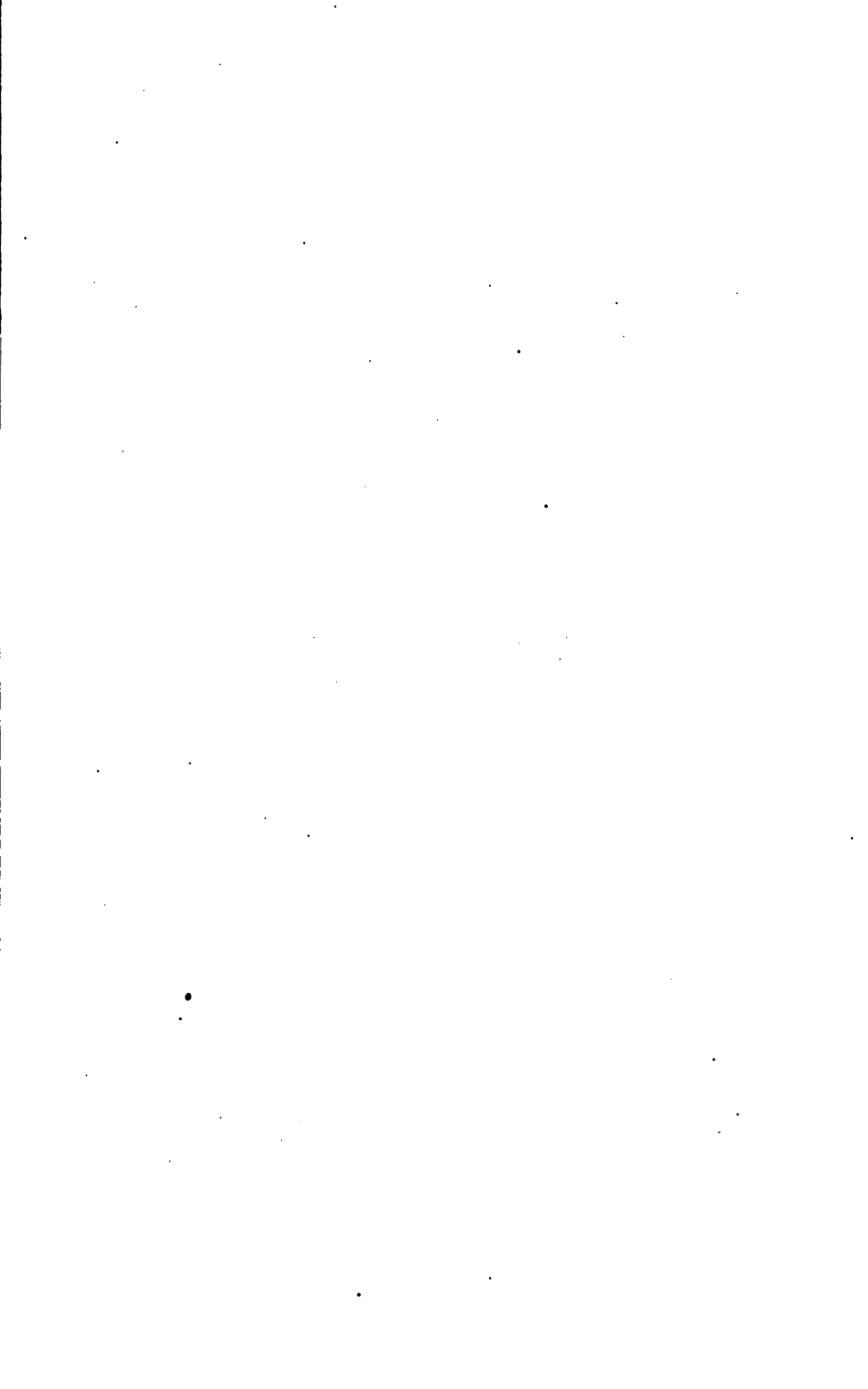
	Page		Page
Robinson v. Woodward	323, 325, 327, 332	Smith v. French	70
v. Yewens	619, 620	v. Hughes	718
Robinson's Executor's Case	85, 86, 92	v. Jackson	659
Roe v. Clayton	343	v. Leavitt	107
Roffey, <i>Ex parte</i>	763, 764	v. Leveaux	447
Rogers v. Ross	10	v. Lidiard	466
v. Ward	494	v. London and South West- ern Railway Co.	455
Rolland v. Hart	318	v. Marconnay	227
Rolleston v. Morton	327	v. Matthews	143
Rooke v. Kensington, Lord	673	v. Palmer	123, 293
Ross, <i>Ex parte</i>	616, 618, 620, 643	v. Smith	653
Roundell v. Currer	288	v. Streetfield	31
Routh v. Webster	243	v. Tarlton	659
Ruffin, <i>Ex parte</i>	653	v. Thorne	465
Rufford, <i>Ex parte</i>	604, 605	Socket v. Wray	513, 517
Rumney v. Keyes	51	Soper, <i>Ex parte</i>	763, 764
Rutland v. Brent	707	Souisse v. Lowther	12
Rutledge v. Smith	139	South Staffordshire Railway Co.	
Ryall v. Rolle	589	v. Burnside	83
S.		South Wales Company v. Wythes	458
Salter v. Bradshaw	372	Spackman v. Timbrell	488
Saltoun's, Lord, Case	408	Spain, King of v. Hullett	223, 238
Saltouns, Lord v. Her Majesty's Advocate-General for Scotland	402	v. Machado	217
Sanborn v. Chamberlin	151	Spence v. Stuart	616
Sandon v. Hooper	47	Spencer's Case	472
Savage v. Carter	659	Spettigue v. Carpenter	160
Saville v. Blackett	663	Spottiswoode v. Stockdale	108
Sawyer v. Baldwin	10	Sprackling v. Ranier	7
Say v. Creed	115, 117	Sprague, <i>Ex parte</i>	757
Scotland, Life Association of v. Siddal	58, 272, 535, 737	Springhead Spinning Co. v. Riley	240, 241
Scott v. Spashett	139, 145, 271	Springle v. Shields	315
Seaton v. Mapp	42	Spurway v. Glynn	663
Secretary of State in Council of India v. Kamachee Boye Sahaba (The Tanjore Case)	222	Stackpole v. Howell	351
Seifferth v. Badham	116, 118, 122	Stanford v. Marshall	510
Selwood v. Midmay	663, 665	Stanton, <i>Ex parte</i>	617, 622
Shackleton v. Sutcliffe	311	v. Hall	274, 277
Shaw, <i>Ex parte</i>	746	Steele, <i>In re</i>	99
Shearer v. Shearer	659	Steere v. Steere	139, 151
Shelley v. Naah	372	Stephenson, <i>Ex parte</i>	580
Sherman v. Sherman	482	Stevens v. Stevens	684
Sidaway v. Hay	643	Stevenson v. Hardie	49
Sidgier v. Birch	616	v. Newnham	750, 751
Siffkin v. Walker	633	Steward v. Blakeway	659
Sigourney v. Munn	659	Stimpson v. Fries	107
Simpson v. Howden, Lord	230	Stoddart v. Allen	107
v. Moore	202	v. Nelson	446
Sinkler v. Sinkler	1	Stokoe v. Robson	183
Sloman v. Bank of England	225	Stone v. Macnair	46
Small v. Attwood	493	Storrs v. Benbow	3, 5
Smeathman v. Bray	596	Straker v. Wilson	202
Smith v. Beatty	718	Strong v. Strong	157, 168
		Strother, <i>In re</i>	99, 100
		Stroughill v. Anstey	489, 490
		Stuart v. Kirkwall, Lord	501, 510, 514
		Sturgis v. Champneys	273
		Summerfield v. Prichard	23, 25

	Page		Page
Sunderland v. Newton	386	United States v. Wagner	217
Surcome v. Pinniger	147	Urquhart v. Urquhart	117, 118
Swansea Vale Railway Co. v. Budd	23		
Swift v. Duffield	1	V.	
Symons v. James	42		
		Vandaleur v. Blagrave	741
T.		Vanderheyden v. Mallony	494
Talbot v. Staniforth	372	Vanderplank v. King	343, 348, 349
Talbot's, Lord, Case	83	Vanderzee v. Willis	580
Tarleton v. Hornbey	707	Van Doren v. Olden	202
Tatem v. Chaplin	472	Van Valkinburgh v. Watson	51
Taylor, <i>Ex parte</i>	750	Vaughan v. Lloyd	442
v. Brooke	523, 531	v. Vanderstegen	501, 503, 514, 517
Tear v. Freebody	694	Vernon v. Acherley	428
Tennant v. Storey	107	Vigers v. Pike	737
Terrell v. Higgs	47	Vint v. Padget	595, 596
Thibodeau v. Levussuer	640	Voorhees v. De Meyer	315
Third Burnt Free Building Society, <i>In re</i>	134		
Thomas v. Thomas	157	W.	
Thompson v. Davenport	635		
v. Hudson	595	Walker v. Fletcher	57
Thorndike v. Hunt	259, 260, 262, 264	v. Frobisher	162
Tidd v. Lister	273, 274, 275, 277	v. Laighton	51
Tiffin v. Longman	115, 116	v. Symonds	70
Tillam v. Copp	166	v. Walker	157
Tillett v. Charing Cross Railway Co.	455	Wallis v. Bastard	209
Tillinghast v. Champlin	659	Walwyn v. Coutes	108
Tinkler v. The Board of Works for Wandsworth District	694	Warburg v. Tucker	85, 86
Toulmin v. Copland	707	Ware v. Egmont, Lord	581
Townsend v. Early	6	v. Regent's Canal Co.	473, 563
v. Martin	663	v. Rowland	115, 116, 117
Townshend, Marquis of v. Stangroom	673, 721	Waring, <i>Ex parte</i>	726, 734, 735, 736
Trappes v. Harter	589	Warren, <i>In re</i>	658
Trebourg v. Pomfret, Lord	597	Wason v. Sanborn	473
Trulock v. Robey	182	Waterfall v. Penistone	589
Tucker v. Hernaman	642	Waters v. Taylor	440
Tulk v. Moxhay	472	v. Travis	315
Tullett v. Armstrong	506, 515	Watford, &c. Railway Co. v. London, &c. Railway Co.	447
Tunstall v. Trappes	322, 324, 325, 327, 332	Wathen v. Smith	209
Turner v. Harvey	721, 723	Watson v. Hayes	779
v. Newport	202	Watts v. Symes	595, 596, 598
Two Sicilies, King of the v. Wilcox	223, 238	Webb v. Manchester and Leeds Railway Co.	563
		Wedderburn v. Wedderburn	540
U.		Weight, <i>Ex parte</i>	618
United States v. Donnal	640	Wellings v. Wellings	707
v. McRae	217	Wesson v. Washburn Iron Co.	567
v. Prioleau	217	Westbrooke v. Blythe	323
		Westzinthus, <i>In re</i>	577, 580, 581
		Wharton v. Barker	115, 117, 119
		v. May	440
		Wheatley v. Bastow	180, 183
		Wheeler, <i>Ex parte</i>	652
		Whicher, <i>In re</i>	101

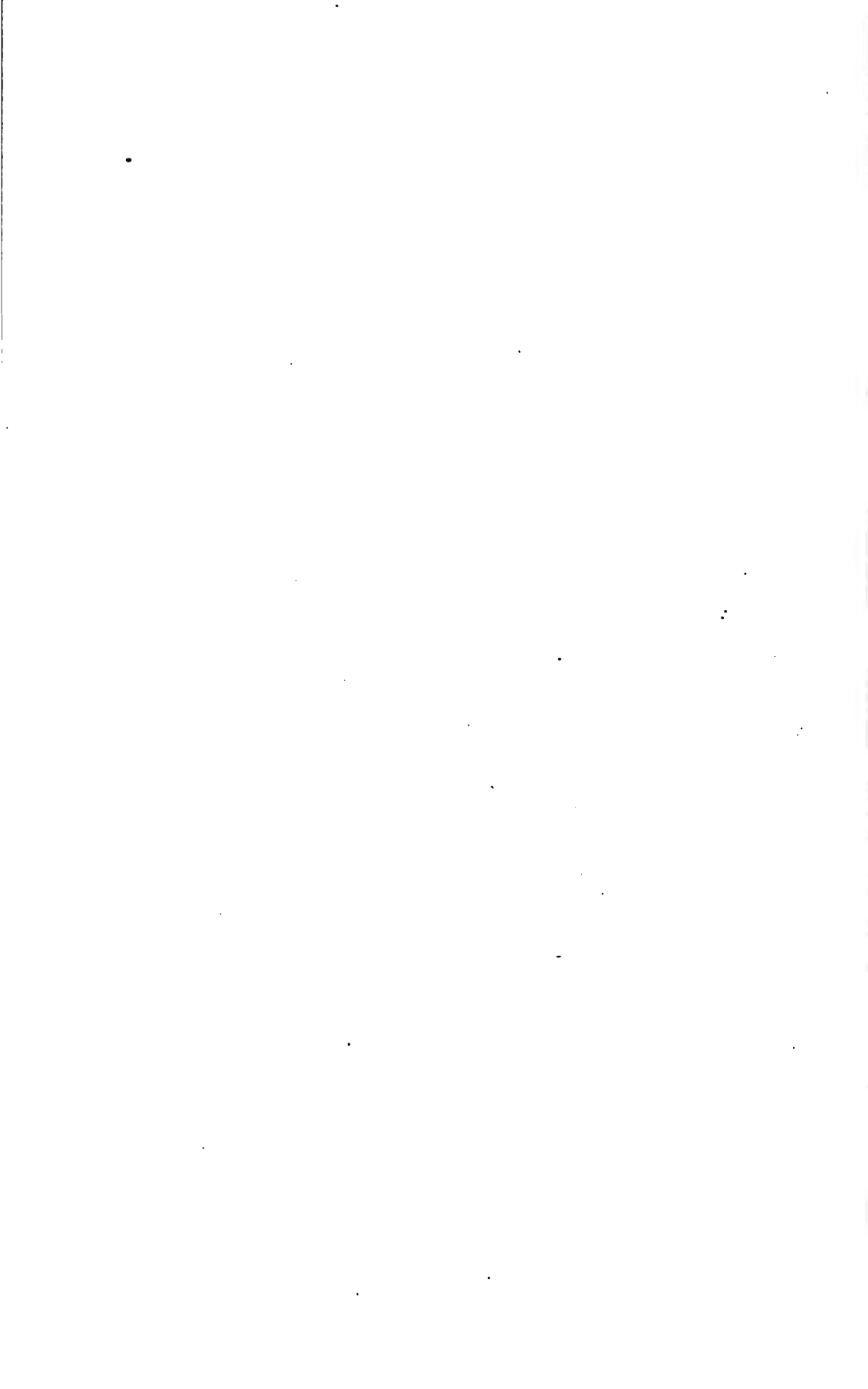
INDEX OF CASES CITED.

xxi

	Page		Page
Whistler v. Newman	512, 513	Wood v. Downes	741
Whitman v. Boston & Maine Rail- road	659	v. Lyne	57
Whitmore v. Empson	589	Woodburn's Trust, <i>In re</i>	134
Whittet's Case	716	Woodhouse v. Woodhouse	58
Whitworth v. Gaugain	352, 328	Woods, <i>Ex parte</i>	614, 615
Whyte v. O'Brien	50	Woolstencroft v. Woolstencroft	43, 129, 474
Wilcox v. Smith	406	Wortham v. Pemberton	273, 274
v. Wheeler	473	Wright v. Chard	503, 514
v. Wilcox	659	v. Mitchell	288, 289
Wild v. Milne	653	v. Morley	274
Wildman's Trust, <i>In re</i>	292, 293	v. Vanderplank	474
Wilkinson v. Adam	6	Wrigley v. Sykes	128
v. Garrett	117, 118	Wryghte v. Lindsay	85
Hartley	310	Wyatt v. Barwell	326
Willard v. Eastham	494, 510	Wylam's Steam Fuel Company v. Street	83
Williams, <i>Ex parte</i>	756		
<i>In re</i>	99, 105	Y.	
v. Price	180		
v. Roberts	282	Yale v. Dederer	494
Wilson, <i>Ex parte</i>	616	Yelland's Case	716
v. Autchterlony	296	Yelsonson's Case	414
Wiltbank's Appeal	202	Yonge, <i>Ex parte</i>	653
Wiltshier v. Cottrell	589	Young v. Guy	741
Winsor v. Griggs	168	v. Keighly	652, 707
Winter v. Innes	756	v. White	741
Winthrop v. Murray	493	Z.	
Withington v. Warren	162		
Witts v. Steere	206	Zouch v. Parsons	540
Wolff v. Oxholm	227		
Wolverhampton Company v. Hawksford	716		



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.



REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

TOWNSEND *v.* EARLY.

1860. December 6, 8. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A will directed that all legacies should be paid within six months after the testator's death. By a codicil, executed on the day of the testator's death, after giving 500*l.* a piece to five of the grandchildren of his brothers by name, he bequeathed 500*l.* to legatees thus described: "each child that may be born to either of the children of either of my brothers, lawfully begotten." *Held*, that of the children of the brothers' children neither those born at the date of the codicil nor those begotten after the testator's death were entitled, but only children *en ventres leur mères* at the date of the codicil and of the testator's death.¹

¹ For all purposes of construction a child *en ventre sa mère* is considered as a child *in esse*. 2 Jarman Wills (4th Am. ed.), 75, 76. A child *en ventre sa mère* will take a share in a fund bequeathed to children, under a general description of children. *Petway v. Powell*, 2 Dev. & Bat. Eq. 312; *Swift v. Duffield*, 5 Serg. & R. 38; 2 Williams Ex. (2d Am. ed.) 801, 802. A testator bequeathed the residue of his personal estate to such of his grandchildren as should be living at his decease, in equal portions; and it was held, that a grandchild born within nine months after the testator's death, was entitled to a share of such residue. *Hall v. Hancock*, 15 Pick. 255. A provision made for a child *en ventre sa mère*, which is afterwards born before the death of the testator, was held not to extend to an after-born posthumous child, although the division of the property was to be made between "all his children now born or to be born." *Burke v. Wilder*, 1 M'Cord Ch. 551. See also *Sinkler v. Sinkler*, 2 Desaus. 127.

THIS was an appeal from the construction put by the Master of the Rolls upon a clause in a codicil to the will of William Townsend, the testator whose estate was being administered in the suit.

By the will in question, dated the 31st March, 1827, the testator, after bequeathing certain specific legacies, gave the residue of his personal estate to Matthew Shaw, John Benbow, John Townsend, and Job Townsend, whom he appointed his executors, upon trust,

with all convenient speed, after his decease, to sell and convert
 * 2 the * same into money, and after payment of all his just debts, funeral and testamentary expenses, and the several legacies thereinbefore by him bequeathed, together with the whole of the legacy duty and duties payable in respect of the several legacies and annuities by him therein given, to make certain investments for the benefit of various legatees, and to pay and divide the residue of the proceeds of his personal estate and effects, unto and amongst all and every his next of kin who should be living at the time of his decease, share and share alike, to and for their, his, and her own respective use and benefit. And the testator thereby directed that all the legacies thereinbefore by him bequeathed should be paid within six calendar months next after his decease; and that, in the event of his executors not being able to pay the same within such period, interest at five per cent should be paid on such legacy or legacies respectively, to commence from the time when the same were thereby respectively directed to be paid.

By a codicil to his will, dated the 14th November, 1827, the testator disposed of his freehold, copyhold, and leasehold estates; and by a second codicil, dated the 10th March, 1832, after directing his executors to invest 2000*l.* in the funds, the proceeds to be applied for the support of six aged women at Witney, he proceeded as follows: —

“ Item. I give and bequeath to Hannah Maria, the daughter of my brother Henry, the sum of 600*l.*, to be paid to her by my said executors on her attaining the age of twenty-one years.” [Then followed other pecuniary legacies in similar terms, to other children of Henry Townsend.] “ Item. I give and bequeath to Edward, the son of John and Alice Early, the sum of 500*l.* for his own use and benefit; also I give and bequeath to Alice, the daughter of the said John and Alice Early, the sum of 500*l.*

* 3 for her own use and * benefit; also I give and bequeath to

Sarah, the daughter of the said John and Alice Early, the sum of 500*l.* for her own use and benefit; also I give and bequeath to Ann, the daughter of Robert and Martha Storrs, the sum of 500*l.* for her own use and benefit. Item. I direct my executors to pay, by and out of my personal estate, exclusively, the sum of 500*l.* a piece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship."

The testator died on the same day (10th March, 1832).

The testator at his death had three brothers, John, Henry, and Job. Of these, John never had any issue, but Henry and Job had twelve grandchildren living at the testator's death, amongst whom were included the five legatees of 500*l.* each named in the testator's second codicil. There were also at that time three grandchildren of the testator's brothers Henry and Job in *ventres leur mères*, and thirty-two grandchildren of the two brothers were both begotten and born after the testator's death. There were also several children of the testator's brothers living at his death.

After the testator's death, William Townsend Storrs (a grandson of the testator's brother Job who was in *ventre sa mère*, at the testator's death) instituted a suit in this Court, claiming to be entitled to one of the 500*l.* legacies under the last clause of the second codicil. On the hearing of that cause—*Storrs v. Benbow*, (a)—the Court declared that only such children of the children of the testator's brothers as were *in esse* at the time of the * death of the testator were entitled to the legacies * 4 of 500*l.* each bequeathed by the codicil to each of the children of either of the children of his brothers lawfully begotten; and directed an inquiry whether the infant plaintiff was *in esse* at the time of the death of the testator.

The Master found that William Townsend Storrs was born on the 29th October, 1832, and that it therefore appeared to him, and he found that the infant plaintiff was *in esse* at the death of the testator, and the administration of the testator's estate was proceeded with on the footing of that decree.

Two other questions subsequently arose upon the construction of the same clause in the testator's second codicil, and were

brought at different times before the Court for decision. The first of these was, whether the four children of John and Alice Early, to whom legacies of 500*l.* were bequeathed by name in the codicil, were also entitled to take similar legacies under its last clause; and as to this the Vice-Chancellor KNIGHT BRUCE decided that they were not so entitled. (a) The other question was, whether a fifth child of John and Alice Early, born after the date of the will but before the date of the second codicil, and to whom no legacy was given by name by that codicil, was entitled to a legacy under the bequest in the second codicil, of 500*l.* a piece to each child that might be born to either of the children of either of the testator's brothers; and on this the Master of the Rolls (Sir JOHN ROMILLY) decided that the child was not so entitled. (b)

* 5 * In the course of the discussion which thus took place doubts were suggested whether the bequests by the clause in question were not altogether void for remoteness; and shortly before the grandchildren of the testator's brothers, who were in *ventres leur mères* at his death, came of age, the trustees of the residuary personal estate presented their petition of appeal to the Lord Chancellor from the decree of Sir JOHN LEACH in *Storrs v. Benbow*, (c) which was affirmed by Lord CRANWORTH. (d)

The bill in the present suit was filed in January, 1859, by the personal representatives of some of the next of kin of the testator, and prayed that the trusts of the will and codicils of the testator (so far as the same had not been performed) might be performed; and, secondly, that the trust funds and property which constituted the ultimate residue of the testator's personal estate might be divided among the plaintiffs and the several other persons entitled thereto; and, thirdly, that, for the purpose of ascertaining the amount of such ultimate residue, it might be declared whether any and what further legacies of 500*l.* were payable, by virtue of the bequest in the second codicil of 500*l.* a piece to each child that might be born to either of the children of either of the testator's brothers.

Upon the hearing of the cause in June, 1860, the Master of the Rolls, by the decree under appeal, decided that children of the

(a) See *Early v. Benbow*, 2 Coll. 342.

(b) See *Early v. Middleton*, 14 Beav. 453.

(c) See 2 Myl. & K. 46.

(d) *Storrs v. Benbow*, 3 De G., M. & G. 390.

children of the testator's brothers, who were born before the date of the second codicil, but were not mentioned by name as legatees in the codicil, were not entitled to 500*l.* each under the bequest of 500*l.* a piece to the children of either of the children of either * of the testator's brothers; and that children of the children * 6 of the testator's brothers begotten and born after the testator's death were not entitled to participate in the benefit of that bequest. (a)

The appellants were grandchildren of the testator's brothers, born before the date of the codicil, but not mentioned in it by name as legatees, and grandchildren of the brothers, both begotten and born after and within twenty-one years of the death of the testator.

Mr. Follett and *Mr. Bevir*, in support of the appeal. — The estate is sufficient to provide legacies for all the children of nephews and nieces of the testator born within twenty-one years after the death of the testator, and to leave a considerable residue besides. The words "may be born," construed according to the authorities, are large enough to include children of nephews and nieces of the testator born within twenty-one years after his death, and children also of nephews and nieces born before the date of the codicils. The fact that he has given legacies to some of such last-mentioned children *nominatim* is not a ground for adopting a different construction. The possibility of some of the after-born children coming into existence at a period too remote does not invalidate the gift as to those children of the class born within the legal period. *Wilkinson v. Adam*, (b) *Defflis v. Goldschmidt*. (c)

Mr. Roundell Palmer and *Mr. Shebbeare*, for the plaintiffs. — It is impossible on principle to adopt a construction * extending the benefit of the clause in question to all chil- * 7 dren that may at any time be born of the testator's nephews and nieces. The amount required for payment of legacies would in that case be indefinite; and the testator's direction that the legacies given by his will should be paid within six months of his death could not be acted upon. It would be impossible for the executors to know within six months whether the estate would be

(a) See *Townsend v. Early*, 28 Beav. 429–436.

(b) 1 Ves. & B. 464.

(c) 1 Meriv. 417; 19 Ves. 566.

sufficient to pay all the legacies, and the period for distribution of the estate and complete execution of the will would have to be postponed for an indefinite period. The Court has never adopted such a construction where the language of the will does not absolutely require it. *Sprackling v. Ranier*, (a) *Butler v. Lowe*, (b) *Mann v. Thompson*. (c) The children of nephews and nieces begotten and born after the death of the testator are therefore excluded. So also children of nephews and nieces born before the date of the codicil, and not expressly named as legatees. To hold otherwise would be to infer that the testator meant to give cumulative gifts of 500*l.* to each of the children of his nephews and nieces previously named as legatees of 500*l.* each in the codicil. Such a construction is not the necessary interpretation of the language of the will ; and, unless it is, the Court will not adopt it.

Mr. Teed and *Mr. Rogers*, for parties in the same interest as the plaintiffs.—The class must be limited, otherwise the gift will be void for remoteness. They cited *Leake v. Robinson*. (d)

Mr. Follett, in reply.

* 8 * THE LORD CHANCELLOR.—I am of opinion that the decree appealed against should be affirmed. It is difficult to put a reasonable construction upon the clause in the second codicil of the testator's will now before us. But I think that we are bound to put some construction upon it, and cannot say that it is incapable of construction, and I do not know that a better construction can be put upon it than that of the Master of the Rolls.

The children alleged to be entitled to the benefit of the disposition in question may be divided into three classes. First, children born at the date of the codicil and of the testator's death. Secondly, children then in *ventres leur mères* and born after the testator's death. And, thirdly, children both begotten and born after the testator's death. With regard to the second class, it has already been decided that they are entitled, and they have been long since paid. As to them, therefore, we have nothing now to consider ; but we are called upon to decide upon the interests of those of the first and third classes. Now I think that, although

(a) 1 Dick. 344.

(c) Kay, 638.

(b) 10 Sim. 317.

(d) 2 Meriv. 363.

the words used by the testator, regarding merely this general sweeping disposition, might admit of children of the testator's nephews and nieces that were then born, yet when we look at the whole will, it cannot be considered clear that this sweeping legacy was not meant to be confined to children not then born but who might be *in esse* at the testator's death. It must be supposed that the testator knew of the existence of children of his nephews and nieces other than those expressly named in his will, but to these last only does he leave legacies by name. It seems clear that all that he intended to give to children born at the date of the codicil he gave to them by name. And when he goes on to make a general disposition to * children of his nephews and * 9 nieces as a class, it would appear that the class must be confined in some sense to children not then born. No consideration of general rules can here assist us, and we must endeavour to gather what the intention of the testator was from the language which he has used in the will and codicils. It seems to me, looking only at that, that he cannot be considered as having intended those children whom he could have named, but whom he has not named, to take under the general disposition in the codicil. Then, with reference to the class of children begotten and born after the testator's death, I think the testator must have intended this general disposition to apply only to those who might come into *esse* and be capable of taking an interest at his death. It cannot be supposed, having regard to the context of the will and to the general directions in it with reference to the distribution of the estate, that the testator intended the winding-up of his estate to be deferred to such a remote and indefinite period as it must necessarily be if all the children afterwards born at any time of the children of either of the testator's brothers are to be entitled to the benefit of this general gift.

I do not go upon the rule against perpetuities, but upon what appears, from the language of the whole will, to be the intention expressed by the testator, that only those children of his nephews and nieces were to take who might be *in esse*, and be capable of taking at the time of his death.

I am glad to say, that, in deciding this appeal, I controvert no rule which can be of any use in construing any other will; but respecting all the rules of construction which have been laid down, and meaning to lay down no rule, and looking only to the

* 10 language of the * will, I think that the most reasonable construction has been put upon the disposition here in question by the decree at the Rolls. I have on a former occasion intimated my opinion, that where, upon an appeal upon the construction of a will, it turns out that the question admitted of no reasonable doubt, the costs of the appeal should not be allowed out of the estate; but, in this case, I think the question sufficiently doubtful to admit of the costs being paid out of the estate.¹

THE LORD JUSTICE KNIGHT BRUCE. — It cannot be inferred that the testator, when he executed the second codicil to his will, believed that he would die on that day; nor can we form a conjecture whether or not he expected to recover from his illness. The context and such of the extrinsic facts as may be regarded, render it impossible to construe the word “may” as the testator has used it in the codicil, otherwise than as importing futurity strictly and exclusively. I think that the same considerations render it impossible to extend the language used to children of the testator’s nephews and nieces born and begotten after the death of the testator. I agree with the Lord Chancellor as to the interpretation of the codicil and as to the costs.

THE LORD JUSTICE TURNER. — I also am of opinion that the decision of the Master of the Rolls should be affirmed. There are two classes of children of the testator’s nephews and nieces, whose claims we have had to consider on this appeal. The first class is of children born in the testator’s lifetime, but not named in his will; the second, of children begotten and born after the testator’s death.

* 11 * As to the second class, no doubt a gift may be expressed in such terms as to include children so circumstanced, but I think the intention to include them must be very clearly shown. The intention must be plain, and for this reason, — that the effect of including them is to stop entirely the distribution of the testator’s estate, inasmuch as it cannot be known at the testator’s death what number of persons will become entitled to legacies under the disposition contained in the codicil, if such after-born children are to be included.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1426, 1427, and cases in note (6); *Sawyer v. Baldwin*, 20 Pick. 388, 389; *Rogers v. Ross*, 4 John. Ch. 608; *Bowditch v. Soltyk*, 99 Mass. 141.

I do not think, therefore, that the mere reference to children to be born is sufficient of itself to include all that may at any time be born. In this case, the context of the will, where the testator directs his legacies to be paid within six months after his death, removes all doubt upon the question. If that direction is to take effect, it is impossible that the testator can have meant to include all the children at any time born to his nephews and nieces in the class. A disposition including them would necessarily stop the payment of any of the legacies, inasmuch as it would be impossible to ascertain the amount required for payment of all the legacies. The context, as it seems to me, is decisive, apart from the general question, that the gift under consideration cannot be held to extend to all children to be born at any time to the testator's nephews and nieces.

Then as to the first class, I think it clear that the expression "may be born" may include children already born; but I rather lean to the opinion which I collect from the judgment in *Early v. Benbow* (a) to have been that of my learned brother, that the words themselves, in the absence of any context to explain them, are to be taken as words of futurity. If so, the question is settled against the appellants.

* It is not necessary, however, to decide the question * 12 whether, under the words "may be born," children of nephews and nieces born at the date of the codicil and not named therein are entitled.

There is another ground for inferring that children of that class were not intended to be included in this disposition. They cannot be included unless children born at the date of the codicil and expressly named as legatees are also included, and the effect of including these last would be to give them cumulative legacies of 500*l.* each as legatees named, and of 500*l.* each under the general description of children of the testator's nephews and nieces. Now these legacies are of the same amount, being gifts of 500*l.* each; and they are given to the legatees in the same character of children of the testator's nephews and nieces, and by the same instrument. But in the case of gifts so circumstanced, the rule of the Court is to presume against double legacies being intended.¹

(a) 2 Coll. 342.

¹ See *Holford v. Wood*, 4 Ves. (Am. ed.) 76 and note (c); *Moggridge v. Thackwell*, 1 Ves. (Am. ed.) 464 note (a), 475 notes (2) and (3); *Manning v.*

Upon that ground, therefore, I think that children of the testator's nephews and nieces born at the date of the codicil, but not named therein, are not entitled under the disposition before us. It is true that in the one case the gift is to children *nominatim*, and in the other to them as members of a class; but I do not think that, in considering this case, that can make any difference. The ground of the decision is, that the Court does not impute to the testator an intention to give twice the same amount by the same instrument and in the same character; but imputes repetition rather than an intention to give. This it does even when the words of the disposition are clear. Much more then, as I think, ought it to consider double legacies not intended, where the words of gift are not clear. The costs of all parties should be paid out of the estate.

* 13 * In the Matter of THE DUKE OF WELLINGTON'S
SETTLED ESTATES,

AND

In the Matter of THE DEFENCE OF THE REALM ACTS,
1842 and 1861.

Ex parte THE DUKE OF WELLINGTON.

1860. December 8. Before the Lord Chancellor Lord CAMPBELL and the
LORDS JUSTICES.

Where, pending an arbitration to settle the amount of compensation to be paid by the ordnance department under the provisions of the defence of the Realm Act, 1842, for damage occasioned by their proceedings under that Act to an ancient flour mill standing on a part of settled estates, an owner of a limited interest in the estates at his own expense repaired the damage, by the erection of works and buildings of a permanent character. *Held*, that an order might be made in Chambers, under the Acts, for payment of the sum awarded for compensation in part reimbursement.

THIS was the application of the Duke of Wellington, as owner of an inalienable interest in tail in the Strathfieldsaye estate, to be

Thesiger, 3 My. & K. 29; Ridges v. Morrison, 1 Bro. C. C. 369; Souisse v. Lowther, 2 Hare, 424, 432; De Witt v. Yates, 10 John. 156; Jones v. Creveling, 4 Harr. 127; 2 Redfield Wills (1st ed.), 507 *et seq.*

allowed to retain a sum of 920*l.* which had been paid to him by the ordnance department of the public service, being the amount of compensation awarded in respect of damage done by their proceedings under the Defence of the Realm Act, 1842, 5 & 6 Vict. c. 94, to an ancient flour mill standing on the estate.

It appeared that a deep pond, which was the main source of supply of water to the stream by the flow of which the mill was worked, had, under the powers given them by that Act, been purchased in 1855 by the Ordnance Department, together with land adjoining the Strathfieldsaye estate. Shortly afterwards they diverted a large quantity of water from the pond to supply the camp at Aldershott, and in consequence the flow of the stream by which the mill was worked was reduced in power to such an extent as to render it impossible to continue the working of the mill with profit. The duke thereupon preferred a claim for compensation, the amount to be * paid for which was, after some * 14 negotiation, referred to arbitrators. The arbitration, owing to various delays, was not completed till September, 1860, when 920*l.*, the amount awarded, was paid into the hands of the duke on the erroneous assumption that he was tenant in fee-simple of the settled estates.

In the mean time the duke, to save the custom of the mill for the benefit of the estate, had expended 900*l.* in erecting a steam-engine, by means of which the working power of the mill had been restored, and 419*l.* 8*s.* in the erection of permanent buildings for its reception.

The duke claimed to be allowed to retain the compensation money in part of reimbursement of the money which he had thus expended for the benefit of the inheritance and reversioners of Strathfieldsaye.

Mr. Hobhouse, in support of the petition. — By the 5 & 6 Vict. c. 94, §§ 25, 26, as amended by the Acts 22 & 23 Vict. c. 21, § 8, and 23 & 24 Vict. c. 112, § 23, the purchase-moneys of any lands or interests in land taken under it from persons not the absolute owners thereof are directed to be paid into the Court of Chancery, and power is given to the Master of the Rolls, or any of the Vice-Chancellors while sitting at Chambers, upon summons, to make such orders for paying the purchase-money, or for placing out such part thereof as shall be principal in the public funds or upon gov-

ernment or real securities, and for payment of the dividends or interest to the respective persons entitled to receive the same, or for laying out the principal or any part thereof in the purchase of other lands or hereditaments to be conveyed and settled to, for, and upon the same uses, trusts, intents, or purposes as the said hereditaments purchased or taken stood settled, or as near

* 15 * thereto as the same can be done, or otherwise concerning the disposition of the said money, or any part thereof, and the interest of the same, or any part thereof, for the benefit of the person and persons entitled to and interested in the same respectively, as the said Court shall think just and desirable.

The application has been made to the Master of the Rolls, on summons; but his Honor, being in doubt whether, under the words of the Act, he was at liberty to make any other order than to direct the re-investment of the compensation money in purchase of land, or of something in the nature of an hereditament, has suggested that the matter should be mentioned to your Lordships; and it is submitted that the order may be made under the words "otherwise for the benefit of the person or persons entitled thereto," the steam-engine and buildings in question being all of a permanent character, and for the benefit of the duke's successors as well as his own.

THE LORD CHANCELLOR. — You have our authority to state to his Honor that we think the order asked may be made, upon the facts alleged being verified, including the character of permanence of the erections in question.

1861. January 12. Before the LORDS JUSTICES.

The plaintiff filed a bill to restrain the defendant from injuring his farms by copper smoke, and also brought an action for damages. Before trial of the action an order was made by consent in the suit that the defendant should purchase the plaintiff's interest in the farms at a price to be ascertained and certified by a surveyor, and that the plaintiff should be at liberty to claim damages in the action down to the date of the surveyor's certificate. A dispute took place before the surveyor whether the valuation ought to be accord-

ing to the existing state of the farms or according to their state before they were injured by the copper smoke. The parties being unable to agree, the surveyor stated that he would hear arguments and decide the question of principle. The Vice-Chancellor then made an order, declaring that the valuation ought to be according to the existing state of the farms. *Held*, on appeal, that such declaration ought not to have been made, and it was discharged without prejudice to any question.¹

THIS was a motion by the plaintiff to discharge an order made by the Vice-Chancellor WOOD on an adjourned summons from Chambers.

The bill was filed to restrain the defendant from carrying on certain copper works near Neath, so as to injure two farms called Coed-y-Arll Ishaf and Coed-y-Arll Uchaf, of which the plaintiff was the occupier.

In 1856, the plaintiff had brought an action against the defendant for damage done to the farms by the copper-works. The action was tried in 1858, and the plaintiff recovered 450*l.* for damages to 1856. In 1859 the plaintiff commenced another action for subsequent damage, and also filed the present bill.

On the 3d of December, 1859, the plaintiff moved for an injunction, but, by consent, an order was made that the defendant should be at liberty to purchase the plaintiff's interest in the farms at a price to be ascertained and certified by a surveyor to be appointed by the plaintiff and the defendant, or by the Judge in Chambers, if they differed. Provision was then made as to * the title to be shown by the plaintiff to his leasehold * 17 interests in the farms. It was ordered that the surveyor should be at liberty, if he should so think fit, to exercise all or any of the powers conferred on an umpire by the Lands Clauses Act, and that the costs of the reference should be borne in manner prescribed by that Act in the case of compulsory purchases by companies. It was provided that the plaintiff should be at liberty to proceed with his action, and to claim therein damages up to the time when the purchase price should be certified by the surveyor, at which time the contract for the purchase of the plaintiff's interest was to be considered as complete.

The parties did not agree in the choice of a valuer, and one was appointed by the Judge in Chambers. Upon his commencing

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1860.

proceedings, the plaintiff insisted that the valuation ought to be made according to the state of the farms before they were injured by copper smoke from the defendant's works. The defendant, on the other hand, insisted that they ought to be valued in their existing state. On the 2d of June, 1860, the valuer wrote to both parties as follows : —

“It is very unsatisfactory to me to be brought down to Neath upon this inquiry, and then by some protest or objection to find that my proceedings are entirely obstructed. To avoid the recurrence of such a result, I think it right, and at the same time due to me, that you should determine the principle on which my valuation is to be based ; and, with this object, I desire to be informed, whether the valuation is to be made in reference to the present state of the property simply, or is the state thereof previously to any damage by Mr. Bankart's works to be inquired into, and to be that on which the valuation is to be founded.”

Each party retaining his own view as to the principle
 * 18 * of valuation, the surveyor on the 30th of June wrote to the solicitor of the defendant as follows : —

“I am in receipt of your letter of yesterday's date. So long as both parties cannot agree upon the principle upon which my valuation should be made, I must determine the same myself under the Orders in Chancery. I cannot decide the point until after the hearing of the case, when I shall be prepared to consider any arguments on the subject.”

The defendant thereupon took out a summons to obtain the directions of the Judge in Chambers as to the correct principle of valuation. The summons was adjourned into Court, and Vice-Chancellor Wood made an order declaring that the farms ought to be valued according to their existing state. The plaintiff now moved, by way of appeal, to discharge this order. He had, on the 20th of July, 1860, recovered 150*l.* damages in his second action.

Mr. Rolt, *Mr. Grove*, and *Mr. Hobhouse*, for the appeal motion. — The order of December, 1859, was an order by consent, that is, in fact, a contract between the parties, not an order of the

Court, and the Court has not, we submit, any jurisdiction to deal with it as the Vice-Chancellor has done; his order substantially introducing a new term into it. But, if such jurisdiction exists, we contend that it has not been rightly exercised. It is perfectly novel to give a valuer directions how he ought to make his valuation, and the Vice-Chancellor, we submit, has adopted a wrong principle of valuation. The plaintiff could not recover prospective damages in his action. He has a right to bring successive actions for the continuing damage. *Sedgwick on Damages*, (a) *Battishill v. Reed*. (b) * All that he has recovered, or could * 19 have recovered, is for injury done to his stock and crops down to the time of bringing the action, or, under the special terms of this order, down to verdict; and if the farms are to be valued in their present ruined state, the plaintiff will have obtained no compensation for the permanent damage done to the ground by the nuisance. The farms are now perfectly worthless for occupation, and the plaintiff might have gone on bringing a fresh action every year, and for the damages which he would thus have recovered he gets no equivalent whatever, if the Vice-Chancellor's declaration is to stand. The consent order does not fix any principle of valuation. The matter was left to the arbitrator; and he ought to fix the price, having regard to all the circumstances, including the right to go on bringing actions at law, or to obtain an injunction in equity, which would be granted as a matter of course after two judgments at law for the plaintiff.

Sir. H. M Cairns and *Mr. H. Cadman Jones*, for the defendant. — We submit that there was jurisdiction to make the declaration of which the plaintiff complains. The order having been made by consent, the Court of course has no jurisdiction to vary it, and the Vice-Chancellor has not done so: he has only declared its true construction; and the Court has jurisdiction to construe a consent order as much as any other agreement. The valuer required assistance, and it was competent to the Court to give an opinion. *Mills v. The Society of Bowyers*. (c) The surveyor was outstepping his duty: he was not an arbitrator to whom all matters in dispute between the parties had been referred; he was simply

(a) Page 147.

(b) 18 C. B. 696.

(c) 3 K. & J. 66.

directed to value a farm, and he was proceeding to entertain
 * 20 * the question, whether he ought not to value, not the farm,
 but a subject which no longer existed, namely, the farm as it
 was before the defendant commenced his copper-works in 1849.
 The direction given to him, therefore, was not in reality a direction
 how he was to value, but what he was to value; and it is right upon
 the merits. It was never contended by us before the Vice-Chan-
 cellor, that the farms were to be valued on the footing that the
 defendant has a right to carry on the copper-works; what we urged
 was, that they should be valued as they are, but on the supposition
 that the works were stopped and finally abandoned on the day
 down to which damages were recovered. The damages are a
 compensation for all injury, permanent or temporary, occasioned
 by the continuance of the nuisance to that time; and if the works
 were then abandoned, it is clear, on the authorities, that no further
 action could be brought for the continuing consequences of the
 discontinued nuisance. *Nicklin v. Williams*, (a) *Bonomi v. Back-*
house, (b) *Clegg v. Dearden*, (c) *Hodsoll v. Stallebrass*, (d) *Fitter v.*
Beale. (e) To value the farms as they were ten years ago would,
 therefore, pay the plaintiff twice over for the damage, and also
 make the defendant pay him for the damage done by the other
 works mentioned in the bill. We submit that the declaration of
 the Vice-Chancellor on its fair construction imports no more than
 we contended for; but, if it does, it is the plaintiff's own fault
 that he did not ask for a variation in its wording, which we should
 not have opposed and do not now object to; but a variation of
 this kind ought not to affect the costs.

[The Lord Justice KNIGHT BRUCE asked the plaintiff's
 * 21 counsel whether they would be satisfied with a variation * to
 the above effect, and was informed that they would not.]

Mr. Rolt, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I do not intend to express
 any opinion whether the valuer or referee ought to proceed or
 ought not to proceed upon the principle enunciated in the declara-

(a) 10 Exch. 259.

(b) El., B. & El. 629, 658.

(c) 12 Q. B. 576.

(d) 11 Ad. & El. 301.

(e) 1 Salk. 11.

tion which is in contest, or on any similar principle. It appears to me, with the greatest deference to the Vice-Chancellor, if I am differing from him, that the declaration goes beyond the bounds of interpretation, and that, however it may have been intended, it is in effect a direction to a referee before proceeding in the matter of the reference, how he is to proceed, and that made after the agreement of reference and without consent. It appears to me that, whether it may or may not be proper for this Court, after the valuation shall have been made, to interfere on the ground of the referee having proceeded, if he shall proceed, upon a principle which the Court shall not think right, the declaration had better not be made at this stage. It seems to me therefore, that, expressly without prejudice to any question, this declaration should be omitted from the order. I think we should not go beyond that, and our order on the present occasion should be entirely silent as to costs.

THE LORD JUSTICE TURNER. — The Vice-Chancellor by this order has beyond all doubt endeavoured to work out the justice of the case between the parties, and to do so in the shortest mode by which that end can be arrived at. Whether it was competent for him to take that course or not, is a point * upon * 22 which I do not mean to give any opinion. I am not satisfied that it was competent to him to interfere at all, and to give directions to the arbitrator in a case of this description as to the mode in which the arbitration should be conducted. But what seems to me to be decisive against the insertion of the declaration contained in this order is this: I think it perfectly clear upon the order of December, 1859, that the question of the mode in which the arbitration should be conducted, or the principle which should guide the arbitrator in deciding upon that question, never was in the view of the parties or at all entered into by them. It was not the subject of agreement between the parties, and if not the subject of agreement between them it seems to me that this declaration must be viewed as introducing a new condition into the agreement, when the parties had never formed an opinion, and had never even entered into the question as to the principle on which they should proceed. In my opinion, therefore, this declaration must be struck out of the order upon that ground.

* 23 * DRAPER v. THE MANCHESTER, SHEFFIELD, AND
LINCOLNSHIRE RAILWAY COMPANY.

1861. January 16. Before the LORDS JUSTICES.

An order having been made for production of books of account relating to the traffic of a railway company, with the usual liberty for the plaintiff, "his solicitors and agents," to inspect, peruse, and take copies, the plaintiff's solicitor went to inspect them, accompanied by a professional accountant, who was the auditor of a neighbouring railway company. *Held*, that the connection of the accountant with the other company made him an improper person to inspect the books, and that the plaintiff ought not to have introduced him.¹ Whether the accountant was an agent within the meaning of the order, *quære*.

THIS was a motion by the defendant Edward Ross, the secretary of the Manchester, Sheffield, and Lincolnshire Railway Company, to discharge an order of Vice-Chancellor STUART, committing him to the Queen's prison for disobedience to an order for production of documents.

The bill was filed by the plaintiff, on behalf of himself and the other shareholders, to restrain the company from a traffic which the plaintiff alleged to be *ultra vires*.

On the 30th of May, 1860, an order was made in Chambers that defendants Chapman, Barker, and Ross should file an affidavit as to the possession of documents, and "that the said defendants do at all reasonable times, upon reasonable notice, produce at the office of Mr. Joseph Guy, their solicitor, situate in Ducie Street, Manchester, the documents which by such affidavit shall appear to be in their possession or power, and in the possession or power of the said company, except such of the same (if any) as they may by such affidavit object to produce. And the applicant, his solicitors and agents, are to be at liberty to inspect and peruse the docu-

¹ The order directs production to the party, his solicitors and agents; but it seems that these words mean his solicitors in the cause and some person professionally connected with them, or his general agents; and accordingly do not authorize production to an accountant or agent specially employed for the particular purpose of inspecting the documents: *Coleman v. West Hartlepool Railway Co.*, 5 L. T. N. S. 266, V. C. W.; *Summerfield v. Prichard*, 10 Hare Ap. 68; 17 Jur. 361; 2 Dan. Ch. Pr. (4th Am. ed.) 1836, 1837; but if required by the circumstances of the case, an order directing the production to such a special agent will be made. *Swansea Vale Railway Co. v. Budd*, L. R. 2 Eq. 274, 12 Jur. N. S. 561, V. C. W.; 2 Dan. Ch. Pr. (4th Am. ed.) 1837.

ments so produced, and to take copies and abstracts thereof and extracts therefrom as the applicant shall be advised, at his expense."

* An affidavit was filed objecting to produce some of the documents. The objection was overruled, and on the 18th of July, 1860, a similar order was made for the production of those documents, with liberty to seal up parts not relating to the matters mentioned in the bill. * 24

An appointment having been made for inspection of the documents, which comprised various books of account and other books relating to the general traffic of the company, the plaintiff's solicitor attended, along with a Mr. Allott, a professional accountant, who had great experience in railway accounts. The solicitors of the company produced some of the documents; but on a subsequent occasion, having discovered that Mr. Allott was a professional accountant and auditor to the Midland Railway Company, they refused to allow him any further inspection, contending that he was not an agent of the plaintiff within the meaning of the order.

On the 4th of December the plaintiff moved for a special order to allow the introduction of an accountant to inspect, which was refused by the Vice-Chancellor as unnecessary, his Honor expressing an opinion that an accountant employed by the plaintiff for the purpose of inspection was an agent within the meaning of the order for production. The plaintiff again applied to the defendants for a production, for the purpose of having the documents inspected by Allott; and this being refused, the plaintiff moved for an order of committal, which, on the 11th of January, 1861, was made by Vice-Chancellor STUART, who was of opinion that Mr. Allott's connection with the Midland Railway Company was no ground for excluding him. The defendant's solicitor deposed, that it was, in his judgment and belief, highly objectionable, and might be detrimental to the interests of the Manchester, Sheffield, and Lincolnshire Railway Company,* and the shareholders therein, * 25 to have their books, accounts, and documents and papers inspected and investigated by an auditor of a neighbouring and rival railway company. The defendant Ross now moved to discharge the order for committal.

Mr. Malins and *Mr. Speed*, for the appeal motion. — We contend that under an order for the inspection of documents the plain-

tiff is not entitled to introduce any person whom he chooses, and say that, because he is in some sense made an agent *pro hac vice*, he is an agent within the meaning of the order. "Agent" must mean a general agent, not a person nominated for the mere purpose of inspection. *Bartley v. Bartley*, (a) *Summerfield v. Pritchard*, (b) *Coleman v. West Hartlepool Harbour and Railway Company*. (c) If special leave for Mr. Allott to inspect were asked for, it ought to be refused, on the ground of his connection with a neighbouring and rival company.

Mr. Bacon and *Mr. Rogers*, for the plaintiff. — The length and complication of the accounts render the assistance of a professional accountant necessary, and the solicitor of the plaintiff deposes that he cannot effectually examine them, and that it is necessary to have an accountant to analyze them. The practice of the record and writ clerks office is opposed to the limited construction which the defendants seek to put on the word "agents." Braithwaite's Rec. and Writ Pr.: (d) and there is no authority for so limiting it. It is no just ground of exception to Mr. Allott that he * 26 is auditor to * the Midland Company. The case might have been different had he been one of the officers constantly employed by them, and having interests identical with theirs.

Mr. Malins, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Whether, under such an order, or such orders, merely as existed before the 11th of the present month, Mr. Allott, the accountant introduced by the plaintiff, was or is disqualified for the purpose under consideration, I had rather not, and I do not, intimate any opinion; but I think that his connection with the other railway company, mentioned in one at least of the affidavits and in argument, is a disqualification. I think that there is a personal exception to him, — by which expression I do not mean any thing in the slightest degree disrespectful towards Mr. Allott, who, I dare say, is a thoroughly respectable man. Using the expression "personal exception" in the sense which I have explained, I am of opinion that he ought not to be

(a) 1 Drew. 233.

(b) 17 Beav. 9.

(c) V. C. WOOD, not reported; see *Bonnardet v. Taylor*, 1 Johns. & H. 383 [7 Jur. N. S. 86].

(d) Page 509.

allowed to inspect. I am further of opinion that he ought not to have been introduced to the inspection, and I think, therefore, that the order should be discharged.

THE LORD JUSTICE TURNER. — I agree with my learned brother that there is enough in the special circumstances of this case to enable us to dispose of it without entering upon the general question who are to be considered as “agents” within the meaning of the general order. But in disposing of this case upon its special circumstances, I desire to be distinctly understood as not intending to decide the question * whether Mr. Allott ought * 27 to be considered as an agent within the meaning of that order. It rather seems to me that the words “solicitors and agents” in the general order have received upon the authorities a limited construction, and I am not disposed to disturb the construction which they have received. I do not think it is necessary to go the length of saying that the words “solicitors and agents” are to be construed “legal agents;” but I think it is at least open to question, whether the word “agents,” for this purpose, does not mean general agents, and not special agents appointed for the particular purpose of inspecting the documents. Suppose the order be for the inspection by the plaintiff or defendant, his solicitors or agents, is it the intention of that order that a man may take any or every solicitor in the city of London to inspect the documents which are produced under the order, and say, “He is my solicitor for the purpose of this inspection?” I think the words “his solicitors” must mean those solicitors who are employed by him in the suit, and I think, that if a limit is to be put on the word “solicitors,” there must necessarily be a limit put upon the word “agents;” also they ought, I should think, to be persons who have been, or are, in some way connected with the suit, — whether legal agents or not I do not mean for the present purpose to say. It seems to have been forgotten in this case, that the solicitor who attends to inspect the documents which are produced may take copies, and consult other persons upon the copies which he may so take; and to have been forgotten, too, that at the hearing of the cause, evidence may be given as to the contents of the books, through the medium of the copies, and that the parties would thus be able, at the hearing, to point out what are the particular entries in the books on which they rely. It may be

added, that the production of the books can be enforced for
 * 28 the purposes of evidence, and that if * notwithstanding all these powers over the documents, any difficulty should ultimately arise, it is always, as I apprehend, in the power of the Court, at the hearing of the cause, to order it to stand over for a limited time for the purpose of any documents which are produced, and which may require careful examination, being inspected and examined. These considerations appear to me to have an important bearing upon the question of the construction of the words "solicitors and agents" in the general order for production, and I am not prepared to say that I should have concurred in the order which has been made on the present occasion, even if there had not been the special circumstances to which my learned brother has referred. It is not necessary, however, to decide that question, and I have rather thrown out these considerations, because I do not wish it to be understood, that in deciding this case upon its special circumstances, I am intimating any impression in favour of the plaintiff upon the general ground, so as to open a question which I think is, to a great extent, concluded by authority. My opinion, therefore, is, that this order ought to be discharged.

1861. January 17, 18. Before the LORDS JUSTICES.

A testatrix by her will directed her fortune to be divided between A. and R. K., appointing trustees for R. K. to pay him half-yearly his share. By codicil, reciting that A. was dead, she desired that her fortune should be divided between R. K. and T. K. for the use of their children, and when they came of age to be settled upon them, share and share alike. R. K. survived the testatrix, and died without ever having had a child. *Held*, that the gift to him by the will of a moiety was absolute, and that the modification introduced by the codicil affected it so far only as was necessary to give effect to the disposition in favour of his children, and that this disposition having failed, the absolute gift remained, so that his personal representatives were entitled to his moiety.¹

¹ See *Lassence v. Tierney*, 1 Mac. & G. 551, note (3); *Agnew v. Pope*, 1 De G. & J. 49, note (1); 1 Jarman Wills (3d Eng. ed.), 162 *et seq.*; *Hearle v. Hicks*, 1 Cl. & Fin. (Am. ed.) 20 and note (1); *Kiver v. Oldfield*, 4 De G. & J. 30.

THIS was an appeal by the next of kin of Ann Kynaston, the testatrix in the cause, from a decision of the Master of the Rolls, holding that a gift in the will had not been cut down by the codicil so as in the events which had happened to produce intestacy.

Ann Kynaston, by will dated the 18th of June, 1793, after giving various pecuniary and specific legacies, proceeded as follows:—

“After all my debts and legacies are paid, I desire my fortune may be divided between Captain Richard Norman, Esq., and my god-daughter Ann Kynaston. I appoint my nephews George and Richard Norman trustees to Captain Richard Norman, to pay him half-yearly his share of my fortune. Part of my fortune is in stock three per cent reduced annuities, part in my nephew’s hands, which there is a bond to show. My furniture I desire may be divided between Captain Richard Norman, Esq., and his sister Mary Norman.”

Then, after some specific bequests, the testatrix appointed her nephews George and Richard Norman executors of her will.

The testatrix made a codicil, dated the 4th of August, 1794, of which the following is the only material part:—

“Since I wrote my will my god-daughter Ann is dead ;
* therefore, after all my debts and legacies are paid, I desire * 30
my fortune may be divided between my nephew Richard
Norman, Esq., and my son-in-law Thomas Kynaston, Esq., for the
use of their children, and when they come of age to have settled
upon them share and share alike, I mean Richard Norman, Esq,
my niece’s brother, that is to share my fortune with my son-in-law
Thomas Kynaston, Esq.”

The Richard Norman mentioned in this codicil was the same as the Captain Norman mentioned in the will.

The testatrix died in 1795. Captain Richard Norman, the legatee, died in 1837, without having had issue. The question then arose, who were entitled to the moiety of residue given to Captain Richard Norman, which was in Court in this suit, a decree in which had been made in 1798. The next of kin of the testatrix claimed it as undisposed of; the children of Thomas

Kynaston claimed it on the ground that the whole residue was given to the children of Richard Norman and Thomas Kynaston *per capita* as one class ; and the personal representatives of Richard Norman claimed it on the ground that the absolute gift to him by the will had only been modified by the codicil for a purpose which had failed, and, therefore, in the events which had happened, remained unaffected.

The Master of the Rolls decided (a) that the personal representatives of Richard Norman were entitled to his moiety of the residue, and from this decision the next of kin of the testatrix appealed.

Mr. Lloyd and Mr. Waley, for the appellants. — We contend that the disposition of the codicil is substitutionary * 31 * for the gift in the will, and if not, it must be read as affixing a trust upon the gift in the will. Captain Norman under the two instruments read together merely took as a trustee for his children, and there being no children to take there is an intestacy as to a moiety of the residue. [*King v. Denison*, (b) *Kidd v. North*, (c) and *Cookson v. Hancock*, (d) were referred to.]

Mr. Druce, for the children of Thomas Kynaston, referred to *Smith v. Streatfield*, (e) and claimed the whole fund.

Mr. W. P. Murray, for the personal representatives of Captain Richard Norman. — A codicil is not to be held to revoke a will further than is necessary to give effect to the purposes appearing on the face of the codicil, and so far as those purposes fail the original gift remains. *Doe v. Hicks*, (g) followed by a mass of cases cited in Jarman on Wills ; (h) *Duffield v. Duffield*. (i) Here the codicil modifies the gift for the purpose of providing for the children ; so far as that purpose fails, we are thrown back upon the will. Now the will gave an absolute interest, the appointment of trustees not being enough to do away with the absolute gift which is clearly expressed in the first clause. *Mayer v. Townsend*, (k) *Lassence v.*

(a) 29 Beav. 96.

(b) 1 Ves. & Bea. 272.

(c) 2 Phil. 91.

(d) 2 Myl. & Cr. 606.

(e) 1 Meriv. 358.

(g) 8 Bing. 475.

(h) Vol. 1, p. 146 (2d ed.).

(i) 3 Bligh N. S. 261.

(k) 3 Beav. 443.

Terney, (a) *Hulme v. Hulme*. (b) Under the terms of the codicil there is a primary division into moieties, so the intention clearly was that the children should take *per stirpes*. The children of Thomas Kynaston, therefore, cannot claim the whole fund.

Mr. Lloyd, in reply.

* THE LORD JUSTICE KNIGHT BRUCE. — I agree with the * 32 opinion of the Master of the Rolls that an absolute interest was given to Captain Richard Norman by the will, and that if any variation was introduced by the codicil in favour of his children, the original gift was affected only so far as was necessary in order to carry into effect the intention in their favour, and, therefore, as he never had a child, was not in the result affected at all. When I say that an absolute interest was given to Captain Norman by the will, I say so not forgetting that the testatrix appointed trustees whom she directed to pay him his share half-yearly. Whether it was intended by this that they should pay him the interest half-yearly, or that they should pay him the capital from time to time, in either case I think the direction not sufficient to cut down the clearly absolute interest given to him by the preceding clause. The codicil also, for the reason that I have stated, has not in my opinion, in the events which have happened, the effect of defeating that absolute gift.

THE LORD JUSTICE TURNER. — I also am unable to come to any conclusion different from that of the Master of the Rolls. It appears to me that the testatrix did not intend by the codicil to alter the gift made by her will to Captain Richard Norman, otherwise than for the benefit of any children he might have. I think that the gift to him by the will was absolute, and that it is conformable to the authorities not to treat the codicil as altering the will any further than is necessary for the purposes of the codicil.

(a) 1 Mac. & G. 551, 565.

(b) 9 Sim. 644.

1861. January 18. Before the LORDS JUSTICES.

A testator in his lifetime entered into contracts for leases of parts of his estate for building purposes. The contracts provided for granting separate leases of the houses when built, apportioning the whole ground-rent among some of them, and leaving the rest to be demised at a peppercorn rent. He devised the estate in strict settlement, without any power under which the leases could be granted. *Held*, that the act for facilitating leases and sales of settled estates could not safely be resorted to for granting these leases.

THE question in this case was, whether certain agreements entered into by the testator for granting leases of parts of the devised property could safely be carried into effect without a private Act of Parliament.

The testator, by his will, devised his real estates in strict settlement, and gave to the tenants for life in possession, if of full age, and to the guardians of infant tenants in tail by purchase in possession, power to grant building and improving leases, in conformity with any contracts which the testator might in his lifetime have entered into for granting leases of the property in such leases respectively comprised.

The testator died in 1860, having entered into various contracts for building leases of parts of his property in Middlesex. These contracts, as is well known to be usual in building contracts relating to property in the neighbourhood of London, provided for granting separate leases of the different houses when completed, and they also contained provisions for apportioning the aggregate ground-rent among some of the houses comprised in each contract, the leases of the remainder being to be granted at a peppercorn rent. The testator had also entered into contracts for sale of parts of his property.

On the death of the testator an infant became tenant for life in possession, so that the leasing power in the will was inapplicable. * 34 The trustees filed the present * bill to have the trusts administered by the Court. By the decree made at the hearing, an inquiry was directed as to the testator's building contracts, and whether any and what steps ought to be taken to give effect to them.

Under this decree a separate certificate was made, recommending that an application should be made to Parliament for an Act enabling the trustees to grant the leases and make the conveyances requisite for carrying into effect the contracts. The trustees presented a petition for leave to apply to Parliament for such Act. The Vice-Chancellor, to whose Court the cause was attached, ordered the petition to stand over, and to come on with the cause for further consideration. The plaintiffs appealed against this order.

Mr. Elmsley and *Mr. Wickens*, for the appellants. — We submit that an application for an Act of Parliament is clearly the only expedient course. We submit that the Settled Estates Act, 19 & 20 Vict. c. 120, cannot be resorted to for granting leases at a peppercorn rent. The Trustee Act, 1850, § 12, and the Extension Act, § 1, cannot help us until decrees have been made for specific performance, which, as the contracts are numerous, would involve the estate in far greater expense than the obtaining a private Act. The Vice-Chancellor thought that if the persons who have agreed to take the leases were to come in under the decree, and submit to orders for specific performance, the Trustee Act would then apply.

THE LORD JUSTICE TURNER. — It may be arguable that an order so obtained would not be a decree or order within the meaning of the Trustee Act.

Mr. Hobhouse, for the infant tenant for life. — I concur with the view of the plaintiffs that it is not *expedient to * 35 rely on the Trustee Act; but it is wished to take the opinion of your Lordships on the point whether the Settled Estates Act may not be safely resorted to. The general practice in the House of Lords is to incorporate the Settled Estates Act by reference in private leasing Acts; and it is therefore desirable in any event to have the opinion of the Court whether such leases as are required here could be granted under that Act. I contend that the provisions as to letting at a peppercorn rent are not in conflict with the provisions of that Act. Each contract must be looked at as a whole. The best rent is reserved for the land comprised in it, taking that land as a whole, so that the leases taken together

demise the land at the best rent, though the rent is apportioned among the different parcels, so that some of them, if looked at separately, are not let at the best rent.

THE LORD JUSTICE TURNER. — Can it be for the advantage of the estate that a question involving so much doubt should be left open?

Mr. Malins and *Mr. Speed*, for other parties.

THE LORD JUSTICE KNIGHT BRUCE. — With all deference to those who think otherwise, I think that, in the circumstances of this case, the only prudent and expedient course is that application should be made for a private Act of Parliament.

THE LORD JUSTICE TURNER. — I am of the same opinion. I think that it would be exceedingly unsafe to resort to the Settled Estates Act for the purpose of carrying these contracts into * 36 execution, * and our order will be prefaced by a declaration of our opinion to that effect.

ORDER: It appearing to their Lordships that the Act passed in the nineteenth and twentieth years of the reign of her Majesty Queen Victoria, intituled "An Act to facilitate leases and sales of settled estates," cannot be safely resorted to for carrying into effect the contracts made by Sir W. F. F. Middleton, the testator in this cause named, for granting leases and for carrying into effect the sales contracted to be made by him as mentioned in the chief clerk's certificate, their Lordships do order that the petitioners be at liberty to apply to Parliament for an Act, &c., &c.

THE OFFICIAL MANAGER OF THE SHEERNESS WELL
OR WATERWORKS COMPANY v. POLSON.

1861. January 19. Before the Lord Chancellor Lord CAMPBELL.

By the conditions of sale of the property of a company in the course of being wound up it was stipulated that the purchaser should accept a conveyance from the official manager under the powers of the Winding-up Acts, 1848 and 1849, or one of them, without requiring the concurrence of any of the shareholders or any other person; but that, if the purchaser should consider the legal estate outstanding and should require a conveyance thereof, he should bear the expenses of obtaining such conveyance or conveyances as he might require and all other expenses incident to getting in such legal estate. *Held*, on the general scope of the conditions, that the purchaser was to be at the risk of getting in the legal estate, and that the vendor was entitled to a specific performance on executing a conveyance of the equitable interest and undertaking, at the expense of the purchaser, to obtain all such conveyances and render all such assistance to the getting in of the legal estate as the purchaser should require and as the vendor was able to obtain or give.¹

THIS was a suit for the specific performance of a contract for the sale of the property of the above-mentioned company, and the appeal was from the construction put by the Master of the Rolls on the 6th of the conditions of sale, under which it had been sold to the defendant.

The decision appealed from is reported in the 29th volume of Mr. Beavan's Reports. (a)

* The property in question consisted of a piece of land, * 37 well, and premises, purchased by the company and conveyed to them in 1829, and it was held by them under their deed of settlement, dated in 1800, for the purpose of supplying the inhabitants of Sheerness with pure water.

The capital of the company was divided into 100 shares, of which the defendant was the owner of five; and by the deed of conveyance to the company, dated in January, 1829, so many undivided one-hundredth parts of the premises were conveyed to each of the shareholders in the company as represented the number of shares in the capital held by him.

(a) Page 70.

¹ See 1 Dart V. & P. (4th Eng. ed.) 137, 138; 1 Sugden V. & P. (8th Am. ed.) 35, 36, 337.

The speculation having proved a losing one, an order to wind up its affairs was obtained in 1857, and in March, 1859, the plaintiff, who had been appointed official manager, acting under the direction of the Court, put up the premises in question for sale by auction in two lots, subject to the following conditions of sale:—

“ 5. The purchaser shall, at the time of sale, pay into the hands of the official manager a deposit at the rate of 10*l.* per centum on the amount of his purchase-money, and sign an agreement to pay the remainder of the purchase-money to the official manager at the office of his solicitors, Messrs. Hughes, Hooker, & Buttanshaw, No. 1, St. Swithin's Lane, London, on or before the 6th day of April next, at which time and place the purchase shall be completed; and the purchaser shall, upon such completion of his purchase, have the actual possession of the property, clear of all outgoing to that day; and if, from any cause, the purchase shall not be completed on that day, the purchaser shall pay interest upon his unpaid purchase-money at the rate of five per

* 38 centum per * annum from that day until completion, or until resale under the last condition.

“ 6. The vendor is, within seven days after the sale, to deliver to the purchaser, or his or her solicitor, an abstract of title, commencing with indentures of lease and release, dated respectively the 1st and 2d days of January, 1829; and the purchaser shall not require the production of any prior documents, although the same may be covenanted to be produced in the said indenture of release. The vendor will also deliver to the purchaser an abstract of the several documents affecting the respective shares into which the said company is divided, but he shall nevertheless accept a conveyance of the entire property from the official manager of the said company under the powers contained in the Joint-stock Companies Winding-up Acts, 1848 and 1849, or one of them, without requiring the concurrence of any of the shareholders or any other person for any purpose whatsoever; and the purchaser shall require no other covenant for title than a covenant by the official manager that he has done no act to incumber. If the purchaser shall consider the legal estate in the whole or any part of the property to be outstanding, and shall require a conveyance thereof, he shall bear the expenses of obtaining all such conveyance or conveyances as he may require, and all other expenses in any

manner incidental to the getting in of such legal estate, and of all proceedings relative thereto. A copy of the abstract of title may be seen on application at the office of the said Messrs. Hughes, Hooker, & Buttanshaw seven days previously to the sale.

" 7. The purchaser is to bear all expense attending the examination of the title-deeds, including travelling expenses, and of the making and obtaining all office, * attested and other * 39 copies of wills, chancery proceedings, deeds, and other documents, whether in the vendor's possession or not; and also of procuring or searching for parochial certificates, statutory declarations, and other evidences of title not in the vendor's possession, which may be required by the purchaser for the verification of the abstract or for any other purpose; but no evidence shall be required of any fact or conclusion of law which shall be stated or noticed in any document dated more than twenty years prior to the day of sale. If the purchaser should be desirous of obtaining the production or an abstract of the documents covenanted to be produced in the aforesaid deed of conveyance of the 2d of January, 1829, the vendor will at his (the purchaser's) expense endeavour to comply with such requisition, but he will not undertake to complete such abstract or to supply any evidence or information in support thereof, nor shall the failure of the vendor to obtain such production or abstract of documents as aforesaid be deemed a valid ground of objection to the title."

The defendant was declared the purchaser of one lot at 670l., and paid the deposit and signed the agreement to pay the remainder of the purchase-money.

In April, 1859, the plaintiff tendered to the defendant for perusal a draft conveyance of the lot purchased by him, to which deed the plaintiff, the defendant, and his dower trustee, were the only parties.

The defendant approved of the draft, but refused to complete the purchase, unless the plaintiff would get in the legal estate in the premises contracted to be sold.

The plaintiff declined, and filed the bill in this suit for a specific performance of the contract.

* The defendant, by his answer, stated as follows :—

* 40

"I deny that I have refused or still refuse to complete my said purchase: on the contrary, I am still willing, and I hereby offer to

complete my said purchase, upon having a proper conveyance of the legal and equitable estates in the property ; or I am willing to complete the purchase and to take only a conveyance of the equitable estate in the property from the plaintiff alone, upon its being satisfactorily shown to me that the plaintiff has, or within a reasonable specified period will have, it in his power to procure me a valid conveyance of the legal estate at my own expense, and upon his undertaking in writing so to do. And I am willing and hereby offer, in accordance with the said conditions of sale, to pay all the expenses which may be incurred in getting in such legal estate ; and I insist and submit to this Court that it is not the fact, under the circumstances herein appearing, that the plaintiff is willing to complete the same purchase according to the said conditions. I admit that the plaintiff is willing to deliver the conveyance already prepared and approved by his solicitors, and executed by him to me ; but I submit to this honourable Court that, in addition to the said conveyance so prepared and approved as aforesaid, I am entitled either to an immediate conveyance of the legal estate in the said hereditaments and premises from the said several co-proprietors or co-owners thereof, or to have some reasonable assurance given me that the plaintiff can and will within some reasonably specified time procure me such a conveyance at my own expense ; and I submit that whether any relief is or is not given to the plaintiff in this suit, the whole costs of the suit ought to be borne by himself."

Upon the hearing of the cause the Master of Rolls, by the decree appealed against, ordered a specific performance
 * 41 * of the contract, and payment by the defendant of the purchase-money, on having a conveyance of the equitable interest in the premises from the plaintiff, — the plaintiff undertaking to obtain all such conveyance and conveyances as the defendant might require and as he was able to obtain, at the expense of the defendant. The decree to be without costs, the wording of the conditions of sale not being sufficiently clear to prevent all question.

Mr. Lloyd, Mr. Selwyn, and Mr. Welford, for the plaintiff, the appeal being from the whole decree. — The clear meaning of the sixth condition of sale is, that the vendor was to deliver to

the purchaser an abstract of the title affecting the shares into which the capital or property of the company was divided, and the purchaser was to accept a conveyance of the entire property from the official manager under the Winding-up Acts; and, if he considered it doubtful whether the legal estate was outstanding as to any part of the property, it was for him to point out what was to be done for the purpose of getting it in, and the vendor was to do what he could to assist him in getting it at his (the purchaser's) expense. By a decree to that effect the holders of the legal estate would become trustees thereof for the purchaser, and the official manager would be discharged.

Mr. Roundell Palmer, and *Mr Dart*, for the defendant. — The stipulation in the sixth condition of sale relates only to the expense of obtaining the legal estate, and does not relieve the vendor of the *onus* thrown upon him by the law, of finding out where it is and of getting it in. By law every vendor undertakes to make a good title and give a complete conveyance, the purchaser paying only the expense of the conveyance.

* The wording of the condition is too ambiguous to vary * 42 the ordinary right existing between the parties except as to the expense. The word "consider," in the condition, must be construed "be advised." As the decree binds the equities, the purchaser would be in no better situation after a conveyance by the official manager alone than he was before.

The condition is at least ambiguous in its terms, and if a vendor sells under conditions against common right, he must express himself in terms not capable of reasonable doubt. *Symons v. James*, (a) *Seaton v. Mapp*. (b)

No reply.

THE LORD CHANCELLOR. — The property in this case is peculiarly circumstanced. There are a considerable number of shareholders, and it was anticipated that there would be great difficulty in getting in the legal estate in the shares so as to give a marketable title. Looking at the transaction, and to the whole of the conditions of sale, the vendor seems clearly to have had this object in view, viz., that the risk of making out where the legal estate was, and of

getting it in, should be transferred from the vendor to the purchaser, who is to ascertain in whom the legal estate is, and how it is to be obtained. The sixth condition of sale provides that "if the purchaser shall consider the legal estate in the whole or any part of the property to be outstanding, and shall require a conveyance thereof, he shall bear the expense of obtaining all such conveyance or conveyances as he may require, and all other expenses in any manner incidental to the getting in of such legal * 43 * estate, and of all proceedings relative thereto." It depends entirely upon the proper interpretation of those words whether the vendor is to find out where the legal estate is, and to convey it to the purchaser at the expense of the latter, or whether the purchaser himself is to find out whether it is outstanding, and where, and point out the manner in which it is to be got in. It seems to me the latter is the proper construction, for if the former were adopted the vendor would be left in the same position as to risk as if no special provision had been made. Upon the whole, my view of this question agrees with that of the Master of the Rolls, my only doubt having been whether he ought not to have given the costs of the suit to the vendor.

In the Matter of LEEMING, a Lunatic.

1861. January 25. Before the LORDS JUSTICES.

Real estate, subject to a mortgage, descended upon a lunatic. By an order made in the lunacy, the mortgage was paid off out of the lunatic's personal estate, without prejudice to the question how it should ultimately be borne. The lunatic afterwards died intestate. *Held*, that the amount ought to be raised out of the real estate and paid to the administratrix as personalty.¹

In this case a lunatic had become entitled by descent to a real estate, subject to a mortgage created by the ancestor. By an order made in the lunacy it was directed that the amount due on the mortgage should be paid out of the funds standing in court to the credit of the lunacy, without prejudice to the question how

¹ See 1 Sugden V. & P. (8th Am. ed.) 195 and cases cited; Woolstencroft v. Woolstencroft, 2 De G., F. & J. 347 and note.

the mortgage debt ought ultimately to be borne, and that the mortgage should be transferred to a trustee to be disposed of as the Court should direct. The mortgage was accordingly paid off out of the fund in Court arising from the lunatic's personal estate.

The lunatic subsequently died intestate, and his administratrix * and next of kin now petitioned that the amount of * 44 the mortgage money might be raised out of the mortgaged estate, and paid to the administratrix, to be disposed of as part of the personal estate of the lunatic.

Mr. W. H. G. Bagshawe, for the petitioners, referred to Shelford on Lunatics, (a) and *Ex parte Hinde*. (b)

Mr. Bowring, for the heir-at-law, opposed the petition, and contended that there was no equity between the real and personal representatives, and that the mortgage having been paid off for the benefit of the lunatic, his heir-at-law and next of kin must take the property as they found it. He referred to *Oxenden v. Lord Compton*. (c)

Their Lordships held, that the sum expended out of the personal estate in paying off the mortgage ought to be raised out of the real estate comprised in the mortgage, and dealt with as personal estate.

* JENNER v. MORRIS.

* 45

1861. January 23, 31. Before the Lord Chancellor Lord CAMPBELL, and the Lord Justice TURNER.

A person who advances to a deserted wife money to enable her to supply herself with necessaries, has no demand, enforceable at law, against the husband for the advances, but has a remedy in equity against him for so much of the money as is actually applied by the wife in paying for necessaries. *Held*, accordingly, where a plaintiff who had deserted his wife filed his bill to enforce a judgment against real estate of the defendant, that the defendant was entitled to set off the amount of sums which before and after the judgment

(a) Page 306 (2d ed.). (b) Amb. 706, n. (c) 2 Ves., Jr. 69.

[35]

had been advanced by the defendant to the wife for the purpose of providing her with necessaries, and had been applied by her for that purpose.¹
May v. Skey, 16 Sim. 588, overruled.

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor KINDERSLEY declaring the defendant entitled to set off against the plaintiff's demand sums which the defendant had paid to the plaintiff's wife to provide her with necessaries, and which had been so applied.

The plaintiff on the 5th of May, 1856, had recovered judgment against the defendant for a sum of £00*l.* and costs, and he filed his present bill for the purpose of enforcing this judgment against the life-interest of the defendant in certain real estates.

The defendant did not dispute the validity of the judgment, but set up by his answer that the plaintiff had in 1844 deserted his wife the sister of the defendant, and had ever since lived separate from her and had not maintained her, and that the defendant before and after the judgment had paid considerable sums of money to her for her maintenance and support, and that such moneys had been actually laid out in the purchase of necessaries for her, and the defendant claimed to be entitled to the repayment of these sums by the plaintiff and to stand in the place of the tradesmen who had supplied the necessaries, and to set off the same against the sum for which the judgment was recovered.

* 46 * The cause was heard by Vice-Chancellor KINDERSLEY, who made a decree declaring that the defendant was entitled to be repaid by the plaintiff the sums which he had advanced to the plaintiff's wife, and which had been actually expended in the purchase of necessaries, and directing an inquiry "whether during the time the plaintiff and his wife were living apart from each other the defendant has paid to or on account of the plaintiff's wife, and when, any and what sum or sums of money for the purpose of providing her with necessaries, and whether such moneys or any and what part or parts thereof have or has been duly applied in providing her with necessaries, having regard to the plaintiff's circumstances and condition in life." (a)

The plaintiff appealed against this part of the decree.

(a) 1 Drew. & Sm. 218.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 103; *Deare v. Soutten*, L. R. 9 Eq. 151 M. R.

Mr. Glasse and *Mr. Herbert Smith*, for the plaintiff, in support of the appeal. — The question is, whether in a Court of Equity a person who owes money to the plaintiff can set off money advanced to the plaintiff's wife to enable her to purchase necessaries. It has been decided by the Vice-Chancellor that he can, but this is on the authority of two old cases decided in 1695 and 1734, *Harrie v. Lee* (a) and *Marlow v. Pitfield*, (b) which have never been followed.

[THE LORD CHANCELLOR. — Have they ever been disapproved or overruled?]

They contravene the common-law rule that a woman cannot borrow so as to make her husband liable: *Stone v. Macnair*; (c) and how does the equity arise, there being no trust for payment of debts, — nothing to make the matter a subject of equitable jurisdiction. The defendant could not have sued here for payment: *May v. Skey*; (d) so how can *there be a set-off? * 47 As regards moneys advanced since the action, there cannot be any case of set-off. As regards the items prior to the action, there cannot be relief after judgment, for the defendant might have pleaded equitably, and after judgment no defence is available in equity of which the defendant might have availed himself at law. *Harrison v. Nettleship*, (e) *Evans v. Bremridge* (g) was before judgment, and *Phelps v. Prothero* (h) and *Terrell v. Higgs* (i) do not conflict with our view. We come to enforce a judgment which is in the nature of a mortgage, and a mere personal demand cannot be set off. The evidence does not prove desertion, and the mere living apart does not render the husband liable; the person supplying necessaries was bound to inquire. The letters from the wife to the husband after the alleged desertion were rejected below; but we submit that they ought to have been admitted: *Rawson v. Haigh*; (k) and they clearly make it appear that she deserted the husband.

[Their Lordships held the letters not admissible.]

(a) 1 P. Wms. 482.

(b) 1 P. Wms. 558.

(c) 1 Moore, 127.

(d) 16 Sim. 588.

(e) 2 Myl. & K. 423.

(g) 8 De G., M. & G. 100.

(h) 7 De G., M. & G. 722.

(i) 1 De G. & J. 388.

(k) 9 Moore, 217.

The defendant, moreover, has not proved that any part of the money was expended in necessities, which he was bound to do, for he cannot stand in any higher position than the tradesmen who supplied the necessities. There is no sufficient *prima facie* case made for an inquiry, and none ought to be directed. *Sandon v. Hooper*, (a) *Marten v. Whichelo*, (b) *Molony v. Kernan*. (c)

Mr. Archibald Smith, for the defendant. — There are three points in the case: First, whether there has been a desertion of the wife by the husband. Secondly, whether money has * 48 been supplied by the * defendant to the wife for the purpose of supplying her with necessities, and has been so expended. Thirdly, whether the law of this Court is, that the defendant has a right of set-off, if the first two points are answered in the affirmative. As to the first point, desertion for the present purpose means either an actual desertion by the husband or a separation by mutual consent: *Smith's Leading Cases*; (d) and the evidence on this point is sufficient. As to advances having been made and applied for necessities, our evidence is sufficient to lay ground for inquiry, and the decree only directs an inquiry. As regards advances since the action was commenced, the rule of common law which confines set-off to demands existing when the action commenced is a purely technical one, and not to be followed in equity. As regards the advances made before the action, even if the demand had been a legal one, we should not have been bound to plead set-off; we might have brought our action; a legal demand is not lost by not setting it off, so why should an equitable one? Moreover, it would be a most mischievous doctrine to hold, that a person having an equitable defence against a legal demand is bound to plead an equitable plea. Now, as to the question of law, *Harris v. Lee* and *Marlow v. Pitfield* are recognized in text-books of high authority. *Fonblanque*, *Equity*, (e) *Jacob, Roper's Husband and Wife*. (g) The case involves two points, whether the demand can be actively enforced in equity, and, if not, whether it is good by way of defence. I contend that it can be actively enforced, but if it be considered that *May v. Skey*, (h)

(a) 6 Beav. 246.

(b) Cr. & Ph. 257.

(c) 2 Dru. & War. 31.

(d) Vol. 2, p. 284 (3d ed.).

(e) Vol. 1, p. 91.

(g) Vol. 2, p. 112.

(h) 16 Sim. 588.

is against this, I say it may still be a good defence. The authorities on the subject are not numerous. * *Darby v. Boucher*, (a) and *Earle v. Peale*, (b) which are against the right to recover at law, go on this, that the lending does not create a debt, because the money may be wasted by the wife instead of being applied in paying for necessaries. A Court of Law cannot look to how the money is applied, but a Court of Equity can. *Stevenson v. Hardie* (c) shows that a borrowing by a married woman, if ratified by her husband, gives a right of action against him. Here money was advanced to pay bills which the husband was legally liable to pay, and a Court of Equity, which can examine into the application of the money, may hold him to have authorized the borrowing of so much as was properly applied.

In *May v. Skeay*, (d) the Vice-Chancellor thought the demand one on which an action might be brought, and, if so, the bill was demurrable. The observations in *Hirst v. Tolson* (e) show that this was the ground of decision. In the present case there is no legal debt. *Knox v. Bushell*. (g) In a case like the present, I should contend that a bill like that in *May v. Skeay* would lie, though perhaps it would not be maintainable if the circumstances were such that actions could be brought in the names of the tradesmen who supplied the necessaries. But it is not necessary to go so far as that; it is a clear case for equitable set-off by way of defence, the demand being one which, if legal, could be set off at law.

Mr. H. Smith, in reply.—The case of separation by consent has not been alleged on the pleadings; the defendant has set up a * case of actual desertion, and must abide by it. * 50 But a separation by mutual consent would not give any such equity as is claimed. *Duncan v. Duncan*. (h) There cannot, at all events, be any set-off of sums advanced after the action commenced. *Whyte v. O'Brien*. (i)

Mr. A. Smith.—That decision went on the ground that the demand was a mere legal cross demand.

Judgment reserved.

(a) 1 Salk. 279.

(b) 1 Salk. 387.

(c) 2 W. Bl. 872.

(d) 16 Sim. 588.

(e) 16 Sim. 620.

(g) 3 C. B. N. S. 334.

(h) 19 Ves. 394.

(i) 1 Sim. & Stu. 551.

January 31.

THE LORD CHANCELLOR. — The question in this case is, whether the defendant has made out his right to an equitable set-off against the judgment debt in respect of which the bill is filed? I am of opinion that the decree of Vice-Chancellor KINDERSLEY in his favour ought to be affirmed.

First, as to the facts, I think the defendant sufficiently proves that the plaintiff in the year 1847 deserted his wife without making any provision for her, and without any imputation of misconduct against her, so that any person who supplied her with necessaries would have been entitled to sue her husband for the amount. The allegations to this effect seem to me to be sufficiently supported by the defendant's answer (which is made evidence), by his cross-examination, and by the plaintiff's letter to his wife dated 23d July, 1849, in which he admits his liability to the tradespeople with whom she had dealt for necessaries.

Next, I think it is proved, by the defendant's answer and * 51 the schedule annexed to it, that during this time he * did supply the plaintiff's wife with sums of money which she applied in providing necessaries for herself, and that he actually paid sums of money to tradespeople who had supplied her with necessaries in satisfaction of their demand. The amount is left uncertain, and the defendant includes in his demand sums paid in respect of the plaintiff's children, which certainly cannot be included in the set-off.¹

Considering that the plaintiff did not amend his bill on the answer coming in (as he might have done) by denying the desertion and the payment of the money by the defendant, and that the plaintiff has neither by himself nor any witness offered any evidence in contradiction, I think that a sufficient foundation is laid for the inquiry directed by the decree, if upon the truth of the facts alleged the set-off ought to be allowed.

Desertion and the advance of money to her actually applied in payment of necessaries furnished to her, being established, the

¹ If a husband, living in a state of separation from his wife, suffers his children to reside with their mother, he is liable for necessaries furnished them; and she is considered his agent to contract for this purpose. *Rumney v. Keyes*, 7 N. H. 571; *Kimball v. Keyes*, 11 Wend. 33; *Walker v. Loughton*, 31 N. H. 111; *Van Valkinburgh v. Watson*, 13 John. 480; *Chitty Contr.* (11th Am. ed.) 239, and notes.

question arises, whether the defendant who advanced this money can in equity claim a set-off in respect of it against a legal debt due from him to the plaintiff and sought to be enforced in equity.

An action at law could not be maintained for such a claim. Those who supply the necessaries to the deserted wife may sue the husband at law, she being considered his agent with uncountermandable authority to order the necessaries on his credit.¹ But Courts of Law will not recognize any privity between the husband and a person who has supplied his wife with money to purchase necessaries, or pays the tradespeople who have furnished them.²

Nevertheless, it has been laid down from ancient times * that a Court of Equity will allow the party who has * 52 advanced the money which is proved to have been actually employed in paying for necessaries furnished to the deserted wife, to stand in the shoes of the tradespeople who furnished the necessaries, and to have a remedy for the amount against the husband.³ I do not find any technical reason given for this; but it may possibly be that equity considers that the tradespeople have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries, and that, although a *chose in action* cannot be assigned at law, a Court of Equity recognizes the right of the assignee.

Whatever may be the reason, the doctrine is explicitly laid down in *Harris v. Lee*, (a) and the other cases referred to. Objection has been made to these authorities that they are very old, and that they do not appear to have been acted upon in modern times. But it may be said, on the other hand, that they may have been acted upon without ever having been questioned, and that they are entitled to more respect from their antiquity. I find that they are cited and treated as good law by subsequent text-writers on this subject. Considering that to establish the equitable liability of the husband, proof is required that the money has actually been applied to the payment of the debt for which the husband would be liable at law, no hardship or inconvenience can arise from

(a) 1 P. Wms. 482.

¹ See 2 Kent, 146; *Gilman v. Andrews*, 28 Vt. 241.

² *Chitty Contr.* (11th Am. ed.), 240; 2 Kent, 146; *Addison Contr.* (2d Am. ed.) 699.

³ See *Chitty Contr.* (11th Am. ed.) 240.

adhering to this doctrine. The circumstances which occurred in *Harris v. Lee* afford an illustration of the benefit which may arise from it, unless money had been supplied beforehand to pay the surgeon employed to attend the wife, she might have died of the disease communicated to her by her husband.

* 53 * One adverse case was cited, which I must notice, *May v.*

Skey, (a) the marginal note being, — “A. having gone abroad and left his wife unprovided for, the plaintiff lent her money to purchase necessities, and she applied it accordingly: Held, that the plaintiff could not sue A. for the money in a Court of Equity.” But it appears that the Vice-Chancellor who decided that case, not holding that there was not a debt due from A. to the plaintiff, which might be recovered, proceeded upon the notion that this was a legal debt, the payment of which could not be directed by a Court of Equity. His Honor more fully explains this as his *ratio decidendi* in the subsequent case of *Hirst v. Tolson*. (b) But this is clearly erroneous. That no action at law could be maintained for such a demand was considered too clear for argument in the recent case of *Knox v. Bushell*. (c)

The only other point which I have to notice is the objection very strenuously relied upon by the appellant, that, at all events, the set-off cannot be admitted for any part of the defendant's demand which accrued before the judgment or before the commencement of the action in which the judgment was recovered, because if it be an equitable defence under the Common Law Procedure Act, 1854, it might and ought to have been pleaded and taken advantage of in that action. But it is unnecessary at present to enter into the controversy, whether it would be expedient, where there is an equitable answer to a demand made in an action at law, to compel the defendant to avail himself of it in the Court of Law; or to consider how far this object has as yet been accomplished by the legislature. In the present case the plaintiff's demand

* 54 and the defendant's cross demand are wholly * unconnected with each other, and the defendant had no answer in bar of the plaintiff's demand. Therefore if he had had a legal set-off he was not bound to avail himself of it. He might have reserved it as the subject of a cross-action, or he might have availed himself of it by way of set-off in any subsequent action for a debt which

(a) 16 Sim. 588.

(b) 16 Sim. 623.

(c) 3 C. B. N. S. 334.

the plaintiff might have brought against him. The equitable set-off might equally be reserved, and may now be rendered available in this equitable suit as, if being a legal set-off, it might have been used in an action at law upon the judgment, although the debt to be set off might have accrued before the commencement of the original action.

For these reasons I am of opinion that the appeal should be dismissed with costs.

THE LORD JUSTICE TURNER. — I agree in opinion with the Lord Chancellor in this case. The evidence before us seems to me to establish a case of desertion by the plaintiff, and I think we are entitled, and indeed bound, to deal with the case on that footing. There are, as it seems to me, only two questions in the case. First, whether, laying out of consideration the proceedings at law, the plaintiff is entitled to relief in equity; and secondly, whether the plaintiff, if so entitled, is debarred of his right in consequence of his not having set it up at law by pleading an equitable plea.

As to the first point, the cases cited in the argument on the part of the respondent clearly prove that when those cases were decided, relief was considered to be due in equity under such circumstances as exist in this case, but we were urged, on the part of the appellant, to disregard * those cases. It was said that they * 55 were of ancient date, and the modern case of *May v. Skey* was cited as opposed to them. What has been said by the Lord Chancellor however disposes of that case, and we are thrown back therefore upon the old authorities. In considering them, it must be borne in mind, that the decrees of the Court very often furnish the best evidence which can now be had of the extent of its jurisdiction and of the principles by which it is guided, and that in disregarding the older decisions of the Court, there is great danger of breaking in upon its principles. This case seems to me to present a remarkable instance of that danger. In Lord REDESDALE'S treatise of pleading I find this statement: (a) "Cases frequently occur in which the principles by which the ordinary Courts are guided in their administration of justice give a right, but from accident, or fraud, or defect in their mode of proceeding, those Courts can afford no remedy, or cannot give the most complete remedy; and some-

(a) Mitfold, p. 112, 4th ed., p. 134, 5th ed.

times the effect of a remedy attempted to be given by a Court of ordinary jurisdiction is defeated by fraud or accident. In such cases Courts of Equity will interpose to give those remedies which the ordinary Courts would give if their powers were equal to the purpose, or their mode of administering justice could reach the evil ; and also to enforce remedies attempted to be given by those Courts when their effect is so defeated." It is therefore an ancient head of the jurisdiction of this Court to interpose in cases in which the principle of the law gives a right, but the forms of the law do not give a remedy. Now what is the case here ? It is beyond question that the principle of law is, that the husband deserting his wife is liable for necessities supplied to her, but it is equally beyond question, that if money be advanced to the wife

* 56 * to purchase necessities, the money, although in fact so applied, cannot be recovered at law, because, according to the necessary form of action for the recovery of the money, the Court of Law cannot look behind the advance and enter into the application of the money. It seems to me therefore that the old cases which have been referred to are well founded in the principles of the Court, and that we are bound to follow them. I think, therefore, that the appellant's argument on the first point wholly fails.

As to the second point. It is new to me, that the creation of a jurisdiction in Courts of Law can oust the jurisdiction of this Court in matters originally within its cognizance, and I am of opinion therefore that the appellant's case fails on this point also. This appeal therefore must, I think, be dismissed, and with costs.

SHEPHERD v. JONES.

1861. January 25. Before the Lord Chancellor Lord CAMPBELL.

A bill of interpleader filed at the record and writ clerks' office together with an affidavit of no collusion: *Held* not demurrable on the ground that the affidavit was not actually annexed by sealing, tying or other mechanical means to the bill.¹

THIS was an interpleader suit, and the appeal was from the decision of the Master of the Rolls overruling two demurrers. The bill was filed at the record and writ clerks' office in November, 1860, together with an affidavit of no collusion. The ground of demurrer was that the affidavit was not actually attached to the bill (a).

It appeared that the bill and affidavit were delivered at the same time at the proper office and to the proper officer; and that this circumstance was known to the defendants before they filed the demurrers.

* *Mr. G. L. Russell* and *Mr. Pemberton*, in support of * 57 the appeal. — To give the Court jurisdiction in an interpleader suit, the bill must be accompanied by an affidavit filed at the same time, and sworn, not in the cause, but before there is any cause. It must be annexed so as to form part of the bill itself, otherwise the Court is unable to tell whether it has jurisdiction. This was so under the old practice, and has not been altered by the Consolidated Orders. The invariable mode of taking the objection has been by demurrer. They referred to Lord Redesdale's Treatise on Pleading, (b) Harrison's Chancery Practice, (c) *Bignold v. Audland*, (d) *Wood v. Lyne*, (e) *Hamilton v. Marks*, (g) *Larabrie v. Brown*, (h) *Walker v. Fletcher*, (i) 53 Geo. 3, c. 159, § 7.

Mr. Roundell Palmer and *Mr. Waller*, *contra*. — It is sufficient that the affidavit was left to be filed at the same time with the bill

(a) See *Jones v. Shepherd*, 29 Beav. 293.

(b) Page 143 (4th ed.).

(g) 5 De G. & S. 638, 643.

(c) Page 5.

(h) 23 Beav. 607; 1 De G. & J. 204.

(d) 11 Sim. 23.

(i) 1 Phil. 115.

(e) 4 De G. & S. 16.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 394 note 2, 2 ib. 1662.

with the proper officer at the proper office. They cited *Errington v. The Attorney-General*. (a)

Mr. G. L. Russell replied.

THE LORD CHANCELLOR. — I think that the decision of the Master of the Rolls upon these demurrers ought to be affirmed, and that this appeal must be dismissed with costs.

* 58 * LIFE ASSOCIATION OF SCOTLAND v. SIDDAL.

COOPER v. GREENE.

1861. January 14, 15. February 9. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Semble, where a trust is definite and clear, a *cestui que trust* will not be held to have sanctioned a breach of trust merely on the ground that while his interest was reversionary he knew of the breach of trust and did not interfere.¹

A trustee of real estate devised his real estate to G. T., subject to the payment of a legacy, so that the trust estate did not pass. G. T., however, acted as trustee. *Held*, that she must be deemed a trustee upon express trust,² and that the Statute of Limitations was therefore no defence to a claim against her estate in respect of a breach of trust.³

G. T. improperly allowed part of the trust fund to be received by B. N. the tenant for life. S., one of the reversioners, borrowed money from C. and mortgaged to him her share in the trust funds. B. N. at the same time gave C. a bond and a mortgage of other property for the same debt, B. N. being a surety for S. in this transaction. The debt having been paid out of B. N.'s estate: *Held*, that G. T.'s representative could not claim to have this payment set off against the claim of S. in respect of the misapplied part of the trust fund.

(a) Bunb. 303.

¹ See 1 Dart V. & P. (4th Eng. ed.) 42.

² See Lewin Trusts (5th Eng. ed.), 171, 652; *Pearce v. Pearce*, 22 Beav. 248; *Hennessey v. Bray*, 33 Beav. 96; *Perry Trusts*, §§ 265, 846.

³ See 2 Sugden V. & P. (8th Am. ed.) 484 and cases in note (f'); 1 Dan. Ch. Pr. (4th Am. ed.) 644 and cases in note (3); *Knight v. Bowyer*, 2 De G. & J. 421 and references in note (1); *Lewin Trusts* (5th Eng. ed.), 620; *Perry Trusts*, § 863 and numerous cases cited in note (8); *Lyon v. Maclay*, 1 Watts, 275; *Hayden v. Stone*, 1 Duvall, 369; *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514.

Money was held in trust to be invested in the purchase of land, to be settled so that S., a married woman, would have been equitable tenant in tail in remainder. The money was improperly received by the tenant for life, who bought with it freeholds and copyholds in his own name. After this S. and her husband joined in mortgaging her interest in the trust funds and the lands to be purchased with them, and a fine was levied to the use of the mortgagee. After this the purchased freeholds and copyholds were declared by decree to belong to the trust. *Held*, that as regarded the copyholds the security was invalid as against S., but good as against her husband.

An estate stood limited, subject to a life-estate, to five persons as tenants in common in tail, with cross remainders between them in tail. One of these five persons, a married woman, concurred with her husband in a deed mortgaging her fifth share and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue, and the deed contained a covenant to levy a fine of the property expressed to be conveyed by the deed. A fine was levied, purporting to extend only to the fifth share. Afterwards one of the other tenants in tail died without issue and without having barred his estate tail. *Held*, that there was an error in the fine, which was caused by 3 & 4 Will. 4, c. 74, § 7, and that the fine was effectual as to one-fourth, and not as to one-fifth only.

THE first of these cases (*The Life Association of Scotland v. Sidal*) came before the Court upon appeal from an order of the Vice-Chancellor Sir JOHN STUART refusing with costs an application on the part of John Seaman and Georgiana Spencer his wife, and Charles Lee the assignee under a fiat in bankruptcy * against * 59 John Seaman, to vary the chief clerk's certificate in that cause. The second appeal was from an order of the same Judge made on further consideration in the cause of *Cooper v. Greene*, a suit relating to the same property.

William Spencer, by his will dated the 25th of March, 1798, devised his real estates unto and to the use of William Thompson, his heirs, and assigns, upon trust during the life of his wife Mary Spencer to pay her an annuity of 150*l.* out of the rents, and to pay the surplus of the rents to his daughter Catherine Norton, the wife of Benjamin Norton, and after the decease of his wife he directed that the estates should remain to Thompson, his heirs, and assigns, to the use of his daughter Catherine Norton for life, with remainder to Benjamin Norton for life, with remainder to the children of Catherine Norton as tenants in common in tail, with cross remainders between them in tail. And it was provided by the will that in case Benjamin Norton and Catherine Norton, or the survivor, should be desirous that the whole or any part of the devised estates should be sold, it should be lawful for Thompson,

his heirs or assigns, to sell and dispose of the same, and give receipts for the purchase-money. And the testator directed that the purchase-moneys should be laid out either in the purchase of other hereditaments, or upon good and sufficient security at interest in the name of his said trustee, and that the hereditaments to be purchased should be conveyed to Thompson, his heirs and assigns, to the uses above declared, and that the interest of the money to be placed out at interest should be paid to the persons for the time being entitled to receive the rents of his estates, and that the principal moneys to be placed out should, after the death of Benjamin and Catherine Norton, be equally divided between all * 60 such children as Catherine Norton * might leave at her decease, the shares of the children to be vested at twenty-one.

The testator William Spencer died in January, 1799. William Thompson accepted the trusts of the will. He sold the greater part of the devised estates, and permitted the proceeds of the sale, amounting to 7000*l.*, to be received by Benjamin Norton, who laid out 6500*l.*, part of these proceeds, in the purchase of freeholds and copyholds at Bawburgh in Norfolk, but applied the residue to his own use. No question, however, arose on either of these appeals as to the application of this residue.

William Thompson died in the year 1806, having by his will devised his real estates to his sister Grace Thompson, but in such terms that the estates remaining vested in him as trustee under the will of William Spencer did not pass by the devise, (a) and Grace Thompson was not his heiress-at-law. Grace Thompson nevertheless assumed to have become trustee under the will of William Spencer, and in the year 1807 she sold the rest of the estates devised by his will for 6300*l.*, and purported to convey the same to the purchaser. She did not actually receive any part of this purchase-money of 6300*l.*, but permitted the whole to be received by Benjamin Norton, he and his brother Francis Norton joining in a bond to her conditioned for indemnifying her against any damage she might sustain in consequence of its being received by him. Benjamin Norton applied the whole of this sum of 6300*l.*, to his own use, and the contest in the appeal in the first above-named suit was as to the right to recover from the estate of Grace Thompson a share of this sum.

(a) *Rackham v. Siddal*, 16 Sim. 297.

* Catherine Norton, the daughter of the testator William * 61 Spencer, and the tenant for life under his will, had issue eleven children, five of these children attained twenty-one, and the remaining six died infants and unmarried. Of the five children who attained twenty-one, one died in 1844, without issue, and without having barred his estate tail under the will. The appellant Georgiana Spencer Seaman was another of the five children who attained twenty-one. She was born on the 3d of June, 1806 or 1807, in which of those years it was disputed, and consequently she attained twenty-one on the 3d of June, 1827 or 1828. On the 13th of December, 1828, she married the appellant John Seaman, and she had ever since been under coverture. Up to the time of her marriage she lived with her father and mother, and some evidence was entered into in the cause with a view to fix her with having then become acquainted with the fact of the trust funds being in the hands of her father Benjamin Norton, but the Court considered the evidence insufficient. A great variety of deeds were at different times executed by the children of Benjamin and Catherine Norton, creating incumbrances on their interests under the will of William Spencer, some of which were relied on as showing that Mrs. Seaman knew of the breach of trust. One of these was a deed executed by Mrs. Seaman on the 1st of April, 1828, some months before her marriage, securing an annuity on her interest in the property. This deed contained a recital that the trust moneys had been lent to Benjamin Norton on mortgage of the Bawburgh estate, and the operative part referred to the sale moneys "then remaining in the hands of the said Benjamin Norton upon the security of a mortgage of his aforesaid estate."

On the 20th of April, 1830, Mr. and Mrs. Seaman * executed a mortgage to James Currie to secure 1700*l.*, and * 62 interest. This deed recited the will of the testator, his death and the death of Mary Spencer, and that certain of the devised estates had, at the request of Benjamin Norton and Catherine Norton, been sold, "and divers other lands and hereditaments have been purchased with part of the money arising by such sales, situate at Bawburgh in the county of Norfolk, and the remainder thereof is now in money; and whereas the said Benjamin Norton and Catherine Norton had five children, all of whom attained the age of twenty-one years; and whereas the said Georgiana Spencer Seaman, formerly Georgiana Spencer Norton, is one of the five

children of the said Benjamin Norton and Catherine Norton, and is entitled for an estate tail in reversion expectant on the decease of the survivor of them the said Benjamin Norton and Catherine Norton to one-fifth part or share of and in the hereditaments and premises devised by the will of the said William Spencer deceased, or of the moneys arising from the sale thereof, or of such other lands and hereditaments as have been or may be purchased with the moneys arising from the sale of the lands so devised and substituted in lieu thereof." Then by the operative part Mr. and Mrs. Seaman granted and assigned to Currie, his heirs, executors, administrators, and assigns, "all that the said Georgiana Spencer Seaman's one-fifth part or share to which she is entitled in reversion expectant on the decease of the survivor of them the said Benjamin Norton and Catherine Norton of and in all and every the lands, tenements, hereditaments, and premises, and real estate comprised in and devised by the said recited will of the said William Spencer deceased, and of and in the moneys arising or that have arisen by any sale or sales thereof, and the stocks, funds, or securities, in or upon which the said moneys are or shall be

* 63 laid out and invested; and of and in all and *every the lands, tenements, hereditaments, and premises which have been or shall hereafter be purchased with the moneys arising by any such sale or sales as aforesaid, and as have been or shall be substituted in lieu of the estates, lands, and hereditaments devised by the will of the said William Spencer as aforesaid; and also all such share and interest of and in the said hereditaments, moneys, and premises as the said Georgiana Spencer Seaman or the said John Seaman in her right are, or either of them is, or may become entitled to on the death of any of the children of the said Benjamin Norton without issue as aforesaid; and all other the estate, interest, right, title, benefit, advantage, claim, and demand whatsoever which the said Georgiana Spencer Seaman, or the said John Seaman in her right, now have or hath, or can, or may hereafter legally or equitably have, claim, demand, or be entitled to under or by virtue of the said recited will of the said William Spencer deceased:" to hold the said one undivided fifth part or share "and all other the premises hereby granted and assigned" to Currie, his heirs, executors, administrators, or assigns, according to the nature thereof, subject to a proviso hereinafter contained for redemption "of the said one-fifth part or share and heredita-

ments." Then followed a covenant by Mr. Seaman that he and his wife would levy a fine, and do and concur in all necessary acts for suffering a recovery of "all and singular the said one undivided one-fifth part, hereditaments and premises hereby granted and conveyed, or intended so to be, with their rights, members, and appurtenances, by such names and descriptions as shall be sufficient to comprise and ascertain the same." The fine and recovery were to enure to the use of Currie, his heirs and assigns, subject to the proviso for redemption. Certain other reversionary interests were similarly granted; and there was a proviso for reconveyance and reassignment to Mrs. Seaman of "the said * reversionary * 64 shares and interests, hereditaments, and premises, stocks, funds, and securities hereby granted and assigned respectively, or mentioned and intended so to be, with their appurtenances," on payment of 1700*l.* with interest as therein mentioned.

A fine was levied in pursuance of the covenant contained in this deed, but it in terms extended only to Mrs. Seaman's fifth share, and was not so worded as to take in any further interest which she might acquire by the death of any of her brothers and sisters without issue. This fine purported to extend to all the estates, some of which were freehold and some copyhold. Mrs. Seaman's interest in both was, of course, only equitable.

Contemporaneously with this security Benjamin Norton gave Currie a bond for 1700*l.*, bearing even date with the mortgage, and executed to him a mortgage of some property in Cambridgeshire as a further security for the same sum. Benjamin Norton gave these securities as a surety for Mr. Seaman by way of additional security for the sum secured by Mr. and Mrs. Seaman's mortgage.

In November, 1830, Seaman became bankrupt, and he never obtained his certificate.

Benjamin Norton died in 1837, and in the same year a suit of *Greene v. Norton* was instituted by Greene, the husband of Catherine, a deceased daughter of Mrs. Norton, to carry out the trusts of Spencer's will, and also to administer B. Norton's estate, and make it liable for the trust moneys received by him. A decree was made in 1839; and by an order on further directions made on the 13th of July, 1848, it was, among other things, declared that the moneys which arose from the sale of William * Spencer's * 65 estates not having been laid out on good and sufficient security at interest, as authorized by his will, were to be considered

as belonging to the persons who would have been entitled under the uses declared by Spencer's will of the estates thereby devised in the shares in which they would have been so entitled; and that the persons entitled were the persons who would have been entitled under the will to the estates if not sold, and for the estates and interests limited by the will, except so far as affected by any subsequent assurances. And it was declared that the 6500*l.*, part of such moneys, having been laid out in the purchase of the freehold and copyhold estates at Bawburgh, those estates were to be considered as subject to the uses declared by the will of Spencer of the estates thereby devised.

Catherine Norton, the wife of Benjamin Norton, died in 1845, and shortly afterwards a suit of *Rackham v. Siddal* was instituted by persons claiming under her against the personal representative of Grace Thompson, for the purpose of recovering the 6300*l.* from her estate, and by the decree in that suit her estate was declared to be liable for that sum. (a) This decree, however, was afterwards reversed upon appeal, so far as it extended to the capital, (b) though left in force as to the life-interest of Catherine Norton. Soon afterwards another suit, which, although not prosecuted, appeared to be pending at the time of the present appeal, was instituted as to the capital by Currie as mortgagee of Mrs. Seaman's share, and various other suits, which it is not necessary to notice more particularly, were subsequently instituted.

In March, 1858, the Life Association of Scotland claiming *66 under Mrs. Bray, another of the children of *Catherine Norton, filed their bill against the personal representative of Grace Thompson to recover Mrs Bray's share of the 6300*l.* and interest. By the decree in this last-mentioned cause it was ordered that an inquiry should be made whether any thing and what was due from the estate of Grace Thompson, in respect of the 6300*l.* and the interest thereon, and to whom. The appellants went in under this decree and claimed one-fourth of the 6300*l.* and interest: but the chief clerk, by his certificate, dated the 27th of April, 1859, after certifying in favour of the Life Association of Scotland as to the one-fourth claimed by them, certified that the persons who were entitled under the limitations contained in the will of William Spencer upon the death of the survivor of Benjamin Nor-

(a) 16 Sim. 297.

(b) 1 Mac. & G. 607.

ton and Catherine his wife to the remaining three-fourths of the trust fund, amongst whom the appellants were included, were debarred their right or claim against the estate of Grace Thompson by acquiescence in the breach of trust committed by her, and that nothing remained due from her estate in respect of their several shares or of the interest thereon respectively, and that their claims had been disallowed accordingly. Mr. and Mrs. Seaman and Lee moved before Vice-Chancellor STUART to vary the certificate, and the Vice-Chancellor having refused the motion the case was now brought before the full Court by way of appeal.

Besides the case of acquiescence the respondents relied on the fact that, in the course of the administration of Benjamin Norton's estate by the Court, Currie, the mortgagee, had been fully paid his 1700*l.* and interest out of that estate, which was only liable by way of suretyship.

With respect to the appeal in *Cooper v. Greene*, it is * only * 67 necessary to state that Edward Spencer Norton, one of Mrs. Seaman's brothers, having died in 1844 a bachelor and without having barred his estate tail, his one-fifth devolved upon the other four children as tenants in common in tail, so that Mrs. Seaman became entitled to one-fourth of the estate, having at the time of Currie's mortgage, in 1830, been entitled only to one-fifth. The freehold and copyhold estates purchased by Benjamin Norton with the 6500*l.* had under circumstances which need not be adverted to, been sold by the Court, and the proceeds were now in Court in *Cooper v. Greene*. By the order on further consideration it was declared that one-fourth of these proceeds belonged to the estate of Benjamin Norton, the surety for the 1700*l.* borrowed from Currie, that sum having been paid to Currie out of Benjamin Norton's estate. This declaration was the subject of the present appeal, the questions being whether Currie's security affected more than one-fifth of any part of the property purchased by Benjamin Norton with the 6500*l.*, and whether it affected the copyhold part of that property at all.

Mr. Toller and *Mr. Archibald Smith*, for the appellants in the first suit. — The other side contend, firstly, that the claim of Mr. and Mrs. Seaman is barred by lapse of time; secondly, that it is barred by acquiescence; and, thirdly, that Mr. Seaman's claim is by way of set-off satisfied out of the estate of Benjamin Norton,

who received the money, and that therefore Grace Thompson's estate stands in the position of a *quasi* surety, and ought not to be made liable. It will be most convenient to take the second point first, as no question can arise about lapse of time apart from acquiescence, until Benjamin Norton's death, for * the Statute of Limitations cannot run against a reversioner. As to acquiescence *Munch v. Cockerell* (a) shows that in a case like the present, acquiescence such as in substance amounts to a release is required. That case shows the difference between the kind of acquiescence necessary to discharge a clear breach of trust, and that necessary to exonerate a trustee from the consequences of not doing something which it was not his clear and plain duty to do. Here there was a plain breach of trust without Mrs. Seaman's knowledge. The case is one of express trust, Grace Thompson having assumed to act as trustee, and therefore being on the same footing with respect to liability as if she had been duly constituted one, so the Statute of Limitations cannot apply at all. But if the case were not one of express trust the statute could not run till 1845, when the interest came into possession. *Duke of Leeds v. Lord Amherst*. (b) As regards laches, the reversioners might have filed a bill while their interest was reversionary, but they were under no obligation to do so. A trustee cannot excuse himself from the consequences of a direct wilful breach of trust, because the reversioner does not file a bill before his interest comes into possession. There has been here a continued litigation enough to keep the rights alive. There cannot be any case of set-off in respect of the demands in question, which arise out of distinct independent transactions.

Mr. Walker, Mr. Elmsley, and Mr. Hobhouse, for the different respondents. — Benjamin Norton received the money and was the person primarily liable for it. He thus was principal debtor * 69 to Mrs. Seaman for a share of it. She is a debtor * to him in respect of Currie's mortgage which has been paid out of his estate, and there is a clear case of set-off, so that the claim against the estate of Grace Thompson can only be for the balance. Then we say that the claim is barred by lapse of time. Where an equitable demand has accrued to a person under no disability, it is barred in twenty years, except in cases of express trust, and this is not such a case.

(a) 5 Myl. & Cr. 217.

(b) 2 Phil. 117.

[THE LORD CHANCELLOR. — Where the trusts are express and a person supposes himself to be the trustee, and acts as such, is it any protection to him that he was not duly constituted ?]

We submit that the case is one of express trust only where a person is duly constituted a trustee and the trust is express, and here Grace Thompson was never a trustee, except by the construction of a Court of Equity.

[THE LORD CHANCELLOR. — The principle of Lord COTTENHAM's decision is, that she having assumed to be a trustee and acted as such, could not be heard to say, for her own benefit, that she had no right to act as trustee.¹]

She was liable, no doubt, as a trustee, for misapplication of the trust property, but we submit that it does not follow that she is to be in the same position for all purposes as if she had been duly appointed. We contend, therefore, that the exception in the statute does not apply. We say moreover that the claim is barred by laches. Mrs. Seaman acquired a right to sue on the breach of trust being committed; she might have sued at once, and from the time of her attaining twenty-one time runs against her, though her interest was reversionary. *Brown v. Cross.* (a) The right of a remainder-man in an equity of redemption is barred if a mortgagee is in possession without accounting for twenty years. *Dallas v. Floyd*, (b) *Harrison v. Hollins*, (c) *Raffety v. King*. (d) There has * been an acquiescence sufficient to * 70 bar the claim. *Brice v. Stokes*, (e) *Walker v. Symonds*, (g) *Smith v. French*. (h) Whether interests are vested or contingent makes no difference as to acquiescence. *Andrews v. Wrigley*. (i) The case of the *Duke of Leeds v. Lord Amherst* turned solely on the Statute of Limitations. The coverture of Mrs. Seaman does not alter the case, there being knowledge after she attained twenty-one, and before her coverture: *Brewer v. Swirles*; (k) and

(a) 14 Beav. 105.

(g) 3 Sw. 64.

(b) 6 Sim. 379.

(h) 2 Atk. 244.

(c) 1 Sim. & Stu. 471.

(i) 4 Bro. C. C. 124.

(d) 1 Keen, 601.

(k) 2 Sm. & G. 219.

(e) 11 Ves. 319.

¹ See *Rackham v. Siddall*, 1 Mac. & G. 607, and note (2); *Lewin Trusts* (5th Eng. ed.), 652; *Perry Trusts*, 846.

even a married woman may be affected by equities arising from her conduct. *Derbishire v. Home*. (a) But supposing these objections got over, still we say that Mrs. Seaman has no claim. Benjamin Norton's estate, which was only a surety for the 1700*l.*, has paid that sum for the benefit of her property; this creates a clear demand against her, and this must be set off, and so must satisfy her claim against him for her one-fourth of 6300*l.* But he was the principal debtor for that 6300*l.*, Grace Thompson was only a surety. The result then is, that the principal debtor has paid, and Grace Thompson's estate is discharged.

Mr. Toller, in reply. — There has not been any acquiescence, such as to bar Mrs. Seaman's right, for acquiescence implies knowledge, and Mrs. Seaman was misled. The deed of 1828 recites that the money was lent to Benjamin Norton on mortgage, and the recitals in the deed of 1828 lead to the conclusion that it was properly invested. Acquiescence amounting to a release is required in a case of this nature, and there has been nothing of the
 * 71 kind on the * part of Mrs. Seaman; indeed, being a married woman, she could not have released. *Phillipson v. Gatty*. (b)

Mr. Toller and *Mr. Archibald Smith*, for the appellants in *Cooper v. Greene*. — The fine in terms extends only to Mrs. Seaman's undivided fifth, and cannot be treated as affecting her after-accruing share in the freehold. As to the copyholds they cannot be affected by the fine at all.

Mr. Walker, for the respondents. — As regards the freeholds it is immaterial that the fine did not purport to include more than a fifth; it must be governed by the deed of covenant, and the covenant manifestly extends to all that the deed purported to grant. The case then is one of error in the fine, which is cured by 3 & 4 Will. 4, c. 74, § 7. The equitable interest in the copyholds would pass by the fine. 3 & 4 Will. 4, c. 74, § 50.

Mr. Toller, in reply. — The 7th section can only apply in a clear case of misdescription. *Powell v. Peach*. (c)

Judgment reserved.

(a) 3 De G., M. & G. 80, 113.

(c) 2 W. Bl. 1202.

(b) 7 Hare, 516.

February 9.

The Lord Justice TURNER, after shortly stating the facts, proceeded as follows: —

There can be no doubt that there was a breach of trust on the part of Grace Thompson, in permitting the 6300*l.* to be received and retained by Benjamin Norton, * and the appel- * 72
lant's case, therefore, is *prima facie* clear and free from difficulty. The *onus* is upon the respondents to displace it. Three points were urged on their behalf: 1st. That the claim was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27; 2d. That independently of the statute it was barred by length of time and acquiescence; and, 3d. That it was displaced by the set-off, to which I have already adverted.

The argument on the first point was that this was not a case of express trust, but on the hearing we stated our opinion that it was, and further consideration has more fully convinced me that that opinion was right. Grace Thompson, although not a trustee or legally representing the trustee named in Spencer's will, assumed to act and acted as a trustee under the will. If she had by writing declared herself to be a trustee, the trust in her could not have been otherwise than express, and her conduct is equivalent to her written declaration. I am not satisfied, however, that it was necessary even to consider this question, for I am much disposed to think that the pending of Currie's suit was of itself sufficient to take the case out of the Statute of Limitations.

The respondents' argument, however, was mainly rested upon length of time independently of any statutory limitation, and upon acquiescence. So much discussion has of late arisen upon this subject that it may be as well to state the general view which I entertain upon it before entering upon the facts of this particular case. Length of time where it does not operate as a statutory or positive bar operates, as I apprehend, simply as evidence of assent or acquiescence.¹ The two propositions of a bar by length of time and by acquiescence are not as I conceive distinct propositions. They constitute but one proposition, and that proposition, when * applied to a question of this description, is that the * 73
cestui que trust assented to the breach of trust.² A *cestui que*

¹ See Kerr F. & M. (1st Am. ed.) 305; 1 Dart V. & P. (4th Eng. ed.) 41.

² See Kerr F. & M. (1st Am. ed.) 305; Lyddon v. Moss, 4 De G. & J. 104.

trust whose interest is reversionary is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not seem to me to bear upon the question of his assent to a breach of trust.¹ He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case. The respondents relied much upon some observations which fell from the Master of the Rolls in the case of *Brown v. Cross*, seeming to import that, if a *cestui que trust* knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be held barred by acquiescence if he does not promptly do so; but this broad proposition was not necessary to the decision of that case, and with all deference to the Master of the Rolls, if he intended to lay down this proposition thus broadly, which I doubt, I am not, as at present advised, prepared to assent to it. It is the duty of the trustee to observe the trust and to preserve the property for the benefit of those entitled in remainder, and I am not prepared to hold that he can be permitted to escape from the liability incident to that duty by simply informing the *cestui que trust* that he has committed or intends to commit a breach of it. He cannot, as I apprehend, where the trust is clear, throw upon the *cestui que trust* the obligation of telling him what his duty is, and of cautioning him to observe it, thus involving the *cestui que trust* in the burden and expense of those duties which he has undertaken himself to perform. If indeed there is a discretion to be exercised

under the trust, the trustee may apply to the *cestui que trust* * 74 for his advice and assistance in the * exercise of it, and if the *cestui que trust* refuses his aid, he may not be entitled afterwards to complain of what the trustee has done in the exercise of his own discretion. So again, where it is doubtful what ought to be done under a trust, the trustee may give notice to the *cestui que trust* of his intention to do a particular act, unless the *cestui que trust* interferes, and if the *cestui que trust* does not interfere, the Court might well hold that the trustee was not liable for doing that act;² but these are cases in which the trust is not

¹ See *Lewin Trusts* (5th Eng. ed.) 630; 2 *Sugden V. & P.* (8th Am. ed.) 669.

² See *Lewin Trusts* (5th Eng. ed.), 415; *Perry Trusts*, § 476.

definite or precise, and I am not prepared to say that where the trust is definite and clear a breach of trust can be held to have been sanctioned or concurred in by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession. The case of *March v. Russell*, (a) seems to me to be a strong authority against such a proposition. I need hardly add, that in cases in which the *cestui que trust* has encouraged the trustee to commit the breach of trust he must of course be bound by it,¹ nor need I add that the observations which I have made are meant to apply to cases of express trust, and not to affect the question how far, if at all, they may apply to constructive trusts.²

Another question which arises in cases of this description is, what amounts to acquiescence. Acquiescence, as I conceive, imports knowledge, for I do not see how a man can be said to have acquiesced in what he did not know, and in cases of this sort I think that acquiescence imports full knowledge, for I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights and of all the material facts and circumstances of the case.³

* In this particular case the respondents rely first upon the * 75 deed of the first April, 1828. There is a question whether Mrs. Seaman was of age at the time when this deed was executed by her, but I think this may be laid out of the case. It is sufficient to say that the deed contains a recital that the trust moneys had been lent to Benjamin Norton on mortgage of the Bawburgh estate, and that, this recital being untrue, Mrs. Seaman could not possibly be bound by the deed. The respondent's case was then attempted to be based on the deed of the 28th April, 1830; but this deed recites no more than that part of the trust property was in money.

(a) 3 Myl. & Cr. 31.

¹ See *Perry Trusts*, § 849, and cases cited in note (6); *Lewin Trusts* (5th Eng. ed.), 559, and cases referred to in note (c).

² See *Kerr F. & M.* (1st Am. ed.) 308; *Clegg v. Edmondson*, 8 De G., M. & G. 787.

³ See *Perry Trusts*, §§ 849, 851; *Lewin Trusts* (5th Eng. ed.), 631, 659, 664, and cases referred to in note (c); *Buckeridge v. Glasse*, 1 Cr. & Ph. 135, per Lord COTTENHAM; *Burrows v. Walls*, 5 De G., M. & G. 233, and cases in note (1); *Kerr F. & M.* (1st Am. ed.) 299, 300, and cases cited; 1 *Sugden V. & P.* (8th Am. ed.) 252.

It does not state that the money was in the hands of Benjamin Norton, or that it was unsecured. It discloses no breach of trust, and certainly does not contain any such full information of the true circumstances of the case as was necessary to render the breach of trust which had been committed, binding upon Mrs. Seaman. It was said, however, that Mrs. Seaman was fixed with full knowledge of the breach of trust by the affidavits of Mrs. Hope and Mrs. Norton, but after looking into the other evidence before us, I am satisfied that no reliance can safely be placed on the affidavit of Mrs. Hope ; and assuming that more reliance may be placed on the affidavit of Mrs. Norton, of which I am not satisfied, I think that her affidavit is far too loose and general to fix upon Mrs. Seaman the knowledge attempted to be imputed by it. Upon the whole I think the second ground of defence fails as completely as the first.

Upon the third point, the question of set-off, we also expressed our opinion at the hearing. It is unnecessary, therefore, to say more upon it, but it may be as well to add to what was said at the time, that, upon examining the papers, I find that in suits to which

Grace Thompson was a party, or in which her estate was represented, * 76 it has been declared that Benjamin Norton was merely a surety for the 1700*l.*, and that consequently that sum must be paid out of Mrs. Seaman's share in relief of his estate, and there cannot, therefore, be any possible case of set-off. Upon these grounds, my opinion is, that the order of the Vice-Chancellor must be discharged, and an order substituted, declaring the estate of Grace Thompson to be liable for Mrs. Seaman's share of the 6300*l.* and interest. We were asked, upon this motion, to give liberty to present a petition in the cause in order to work out this claim, but I think we must leave the parties, in this respect, to take such course as they may be advised.

As to the second appeal, that in *Cooper v. Greene*, two questions arise : First, whether the fine affects more than one-fifth of the freehold parts of the estate. Secondly, whether the copyhold parts of the estate are at all affected by it. As to the first point it was said for the appellants, that the fine in terms extends to one-fifth only ; but it was argued for the respondents, that by virtue of the 3 & 4 Will. 4, c. 74, § 7, it ought to be taken to extend to one-fourth, and not to one-fifth only, and, on considering that section,

it seems to me to have been intended to meet the case of an error, misdescription, or omission in the indentures of the fine, or in the record or other proceedings of the fine, and to enable any such error, misdescription or omission to be corrected by the deed to lead the uses of the fine; and I think that the covenant to levy the fine contained in this deed was meant to extend to all the interest comprised in the previous grant. In my opinion, therefore, one-fourth of the freeholds must be held to have been affected by the fine; but as to the second point, as to the copyholds, I think the better opinion is, that they are not affected by the fine, though I take it to be clear that * Mr. Seaman's interest in * 77 them must have passed by the deed. The decree, therefore, must be altered so as to meet these views.

THE LORD CHANCELLOR. — I entirely concur in the view taken by Lord Justice TURNER in both appeals.

In the first, — as to the liability of the estate of Grace Thompson to the claim for Mrs. Seaman's share of the sum of 6300*l.*, — the only substantial question is, whether, in bar of this claim, a sufficient answer is given by proof of the acquiescence of the *cestui que trust* in the breach of trust which is the foundation of the claim. According to the decision of the Vice-Chancellor of England in *Rackham v. Siddal*, (a) affirmed so far by Lord Chancellor COTTENHAM on appeal, (b) there was a clear breach of trust, — Grace Thompson having acted as a trustee, as such having sold the trust property and received the purchase-money, and having lent it to Benjamin Norton, instead of investing it according to the directions contained in the will of William Spencer.

On the general doctrine of acquiescence by *cestuis que trust*, which has lately been so much canvassed, I agree in the explanation of the subject which has been so lucidly given by Lord Justice TURNER. I must add, that although the rule be that the *onus* lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred, it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed.

* In the present case the respondents admit the obligation * 78 upon them to lay a foundation for their defence, by proving

(a) 16 Sim. 297.

(b) 1 Mac. & G. 607.

The company was formed, in the year 1845, for obtaining an Act of Parliament to make a railway ; but it failed in obtaining the Act, and by an order dated the 24th of May, 1849, it was ordered to be wound up. Mr. Parbury had become the holder of a large number of shares in the company, and he had executed the subscribers' agreement and parliamentary contract in respect of those shares. On the 4th of June, 1853, being then in India, he obtained under the Indian Insolvent Act, 11 & 12 Vict. c. 21, an order

* 81 *nisi* for his discharge in the nature * of a certificate. The schedule which he filed in pursuance of the provisions of that Act did not refer to his liability as a shareholder in this company. Notice of this order having been first inserted in the gazette of the presidency, was afterwards, on the 24th August, 1853, inserted in the London Gazette, and on the 1st July, 1854, the order was made absolute. No proceedings appeared to have been taken for putting Mr. Parbury's name on the list of contributories until long after the order for his discharge had been made absolute ; but on the 25th March, 1858, his name was put upon the list. The call as to which Mr. Parbury disputed his liability was made on the 9th of February, 1860, for the payment of debts due from the company and for costs of the winding-up.

The case had been argued by *Mr. Baily* and *Mr. De Gez*, for the appellant, and by *Mr. Glasse* and *Mr. Roxburgh*, for the respondent, before the Lords Justices, who had not agreed as to the decision to be given upon it, and it was ordered to be argued before the full Court by one counsel on each side.

Mr. Baily, for Parbury. — I contend that from the 1st of July, 1854, when the order was made absolute, Mr. Parbury was relieved from all liability. It is true that Mr. Parbury's liability to the company was not mentioned in the schedule, but that omission, I submit, makes no difference. Upon the true construction of the Act 11 Vict. c. 21, the proceedings under it were intended to be analogous, in effect, to an English bankruptcy, not to a discharge under the Acts for the relief of insolvent debtors. The 60th section is what I mainly rely on. If Mr. Parbury had filed a complete schedule, there could not have been any question in

* 82 the case. Now it cannot, in the absence of clear * words to that effect, be presumed that the legislature intended an

omission, however slight, in the schedule of assets to vitiate the proceedings.

[*Mr. Glasse*, for the official manager. — We do not contend that such an omission has that effect.]

Then the omission of a creditor cannot have it. The words of the Act are quite as stringent with respect to the schedule of assets as with respect to the schedule of creditors. The schedules are not required to be published in the gazette, nor does the Act contain any provisions for giving notice to the creditors individually. The omission of the name of a creditor, therefore, does not in any way tend to his damage. If the Act had provided for sending notice to every creditor, there would have been a good reason for holding the omission of a creditor's name to invalidate the proceedings as against him: but, as there is no such provision, there is no reason for holding the insertion of the creditor's name in the schedule a condition precedent to the discharge from his debt, unless the Act in terms makes it so, which it does not. The insolvency Acts do not furnish any analogy, for they expressly provide for a discharge only with respect to the debts mentioned in the schedule. Then, assuming it established that the Indian order has the effect of a certificate in bankruptcy, how does the case stand? Suppose a partnership come to an end, and a decree made for winding up its affairs. One of the partners, who is out of the jurisdiction, has not been made a party, and after decree, he becomes bankrupt, and comes within the jurisdiction. The supplemental bill would be against his assignees, not against himself. The winding-up order has the same effect as a decree in a suit, and the analogy is complete. The certificate would be a complete bar against all demands against him; the assignees would stand in his place. In *Chapple's Case*, (a) the order of events was: 1. The bankruptcy of the company; 2. * 83 The bankruptcy of Chapple; 3. His certificate; 4. The winding-up order, which was made in 1850, as appears from *Lord Talbot's Case*. (b) Here, the winding-up order was before the certificate; but that cannot make any difference, there not having been any transactions which could alter the state of liabilities as they stood at the date of the winding-up order. In *Greenshield's*

(a) 5 De G. & Sm. 401.

(b) 5 De G. & Sm. 386.

Case, (a) it was decided, that a bankrupt who held shares in an unincorporated company ceased upon his bankruptcy to be connected with the company. There, the bankruptcy and the certificate were before the stoppage of the company, but this cannot affect the principle. The bankruptcy of a partner after a decree of winding-up exempts him from liability. He remains a party to the record, but he is merely a nominal party, and if he has not been made a party before his bankruptcy, he is not made one afterwards. It has been contended here, that the bankrupt remains a partner and is liable to be put on the list in respect of liabilities accruing since his bankruptcy. That may be so in cases of a continuing concern, in which, by the terms of the deed, the assignees may elect to take the shares or not, as in *South Staffordshire Railway Company v. Burnside*; (b) but in *Wylam's Steam Fuel Company v. Street*, (c) where the assignees had no power of making themselves shareholders, it was held, that on bankruptcy the shareholder ceased to be such. The balance of a partnership account may be proved in bankruptcy. *Aflalo v. Fourdrinier*. (d) The result of the cases, I contend, is, that though Mr. Parbury might properly have been put on the list before his bankruptcy, he cannot properly be put upon it after his bankruptcy.

* 84 * *Mr. Glasse*, for the official manager. — I contend first, that the omission of this debt from Mr. Parbury's schedule is fatal to his defence. The spirit of the Act is to require a full disclosure by the insolvent of the state of his affairs. The proceeding under it is a voluntary one on the part of the debtor, and the recital of the Act treats it as being passed for the amendment of the law as to insolvent debtors. The 5th and 6th sections provide for the commencement of the proceedings by a petition and schedule, the form of the schedule given by the Act showing that it is to contain a full account of debts. The 7th provides for the vesting of the property. The 9th is the first that adverts to bankruptcy. The 13th provides for the grant of protection, confining it to debts mentioned in the schedule. The 22d provides for proof by a landlord whether mentioned in the schedule or not. The 35th directs notice to be given to the creditors. Notice cannot be given to those not mentioned in the schedule. The 38th enables

(a) 5 De G. & Sm. 599.

(c) 10 Exch. 849.

(b) 5 Exch. 129.

(d) 6 Bing. 306.

creditors not named in the schedule to come in and prove. The 40th provides that all debts which could be proved in bankruptcy may be proved. The 43d directs that unless the Court is satisfied that all the property is situate and all the debtors and creditors resident in India a third of the assets got in may be reserved. How is the Court to be so satisfied unless the creditors are all mentioned in the schedule? The 47th gives protection from all debts mentioned in the schedule or established in the proceedings. The 49th suspends actions in India as to claims mentioned in the schedule. The 59th and 60th are those on which the question mainly turns. The 59th provides for an order founded on the consent of the creditors. Suppose the insolvent to suppress the names of all the creditors likely to oppose, the consent order would be made in their absence. This shows that a complete schedule is a *condition precedent. The 60th proceeds on the footing of a schedule being filed and of an order *nisi* having been made under section 59, and it contains a provision as to what is to be done if it appears to the Court that there are creditors without the limits. How is that to appear but by the schedule?

[The Lord Justice TURNER referred to the proviso in sect. 83.]

That proviso merely relates to creditors named in the schedule who are out of the jurisdiction. If the argument on the other side is correct an insolvent has nothing to do but to go to India and omit every English debt from his schedule, and he will then obtain a complete discharge without any chance of opposition. But if the Court should be against me on the first point, and consider the Indian discharge equivalent to a bankruptcy certificate in England, I contend that the claim in question is one not provable under a bankruptcy nor barrable by the certificate. The call is a new debt, an original liability created by the Winding-up Act. *Robinson's Executors' Case*, (a) *Wryghte v. Lindsay*. (b) It arises when the call is made, and there cannot be any right to prove for it in bankruptcy before it is made. So in *Warburg v. Tucker*, (c) a covenant to pay premiums on a policy of assurance was held not pro-
 .

(a) 6 De G., M. & G. 572.

(b) 6 Jur. N. S. 435 in D. P.; 3 Macq. 772.

(c) 5 El. & Bl. 384.

ble. A great part of the demand here is for costs of winding-up, which arose after the bankruptcy and could not have been proved for.

[THE LORD JUSTICE TURNER. — Could not the balance of a partnership account be proved for ?]

No doubt it could, but apart from the question of costs there is the objection here that this was no case of partnership at all ; the whole matter was contingent and uncertain, the undertaking being a mere abortive scheme.

* 86 * *Mr. Baily*, in reply. — As regards the argument founded on sect. 59 of the Indian Insolvent Act, the proceedings here were carried through under sect. 60, and the 59th sect. has no bearing on them. It is conceded that the omission of a trifling asset would not vitiate the proceedings ; this shows that the filing a complete and accurate schedule is not a condition precedent. If there were any fraudulent omission the Indian Court has jurisdiction to apply a remedy. As to the other branch of the argument *Robinson's Executors' Case* has no bearing on the present, the question there having merely been whether the debt was a specialty debt or only a simple-contract debt. In *Warburg v. Tucker* the demand entirely depended on what might occur after the bankruptcy ; here the liability was fixed before bankruptcy.

Judgment reserved.

February 16.

THE LORD CHANCELLOR. — In this case I am of opinion that the judgment of the Court ought to be in favour of the appellant.

The great question is, whether he ought to have been placed upon the list of contributories on the 25th of March, 1858. This surely depends upon whether he was then liable for any part of the debts which the contributories were to be called upon to pay. It cannot be enough that he was once liable, and might once have been put upon the list, if he was discharged from all liability for those debts before the attempt was made to include him as a contributory.

* 87 It appears to me that by the absolute order of the * Insolvent Court at Calcutta, in July, 1854, he had been discharged from

all liability for these debts. There being no imputation upon the regularity or good faith of the proceedings in that Court, we must assume that they were regular and *bond fide*. The only objection seriously urged is, that he had not specified in his schedule, in any way, his liability as a shareholder in this company. With respect to the discharge of an insolvent, or non-trader, in England, such an objection would be fatal, there being an express enactment that the insolvent shall only be discharged from debts specified in his schedule. But, in the Indian Insolvent Act, 11 Vict. c. 21, the only condition is by section 60, that the insolvent "shall have filed his schedule," which may be in a form given by the Act. The insolvent had filed his schedule according to that form, which, if strictly pursued, would hardly admit of the required specification of this liability. What I rely upon is, that the statute does not make the specification of the debt or liability a condition precedent to a discharge from the debt or liability, and it is quite clear that according to the Indian Insolvent Act there are debts not specified in the schedule from which, by virtue of the absolute order, the insolvent is discharged. All the other requisites of the statute were complied with, and a regular discharge under this Act of Parliament has the effect "to discharge the insolvent and all his after-acquired property from all demands which would be discharged by a certificate under the bankrupt laws in England, granted under a *fiat* bearing even date with the insolvent's petition, or with the adjudication."

The only remaining question is, whether the appellant would have been discharged by a certificate under an English bankruptcy, from the demands in respect of which it is sought to make him a contributory. Upon this point I think that no reasonable doubt can be *entertained. Long before the adjudication or * 88 petition in India, the company in which the appellant was a shareholder had ceased to exist, and no new debts could be incurred. The cases relied upon to show that there could not have been a proof in respect of this liability under an English bankruptcy seem to me to have no application; for here, before the bankruptcy, all the events from which the demand arose had actually happened, and all the facts necessary to ascertain the appellant's proportion and amount of the sum to be contributed were extant and capable of strict proof. What resemblance has this to a continuing covenant to keep up a life policy, and, in default of

doing so, to pay from time to time the sums expended by the cove-
nantee in paying the premiums? Something was said during the
argument of a new demand in respect of the expenses of the wind-
ing-up; but these expenses are only incident to the debts to be
paid, and cannot fall upon any one who is entirely discharged from
these debts.

If this be so, the order of Vice-Chancellor KINDERSLEY ought to
be reversed, the name of the appellant should be taken from the
list of contributories, and he is entitled to a declaration that he is
not liable for the call.

THE LORD JUSTICE KNIGHT BRUCE. — My opinion is with the
appellant in this case, except as to the question of the effect or
absence of effect against him of the omission from the Indian
schedule of any mention of the order for winding up the company
or association before us, and indeed of any reference whatever to
the company or association. Upon that question, so far as the
demand in dispute is concerned, I acknowledge that I doubt, but
neither the Lord Chancellor nor the Lord Justice TURNER partici-
pating in that doubt, it is immaterial.

* 89 * THE LORD JUSTICE TURNER. — The principal question in
this case appears to be, whether Mr. Parbury ought to have
been put upon the list. The Vice-Chancellor seems to have con-
sidered that he was properly put upon the list, because he might
have been put on at any time between the date of the winding-up
order and the date of the order absolute for his discharge under
the Insolvent Act, and had he been so put on, his name would not
have been taken off upon the order for his discharge under the
Insolvent Act being made: but, with deference to his Honor, I do
not agree in that view. The list to be made is a list of the con-
tributories, and it is made for the purpose of ascertaining who are
the persons liable for the debts or entitled to the assets of the
company, and I think, therefore, the question whether the name
of any person should be put upon the list must depend upon
whether that person is a contributory at the time when his name
is put on, not upon whether he has been so at any former time.
The question, therefore, in this case, as I view it, is, whether Mr.
Parbury was a contributory of this company on the 25th of March,

1858, when his name was put upon the list. Was or was he not at that time liable for the debts or entitled to any share of the assets of the company?

This question mainly depends, as it seems to me, upon the operation of the order absolute under the Indian Insolvent Act. Having attentively considered that Act I have come to the conclusion that the order absolute under that Act was meant to discharge and does discharge the insolvent from all demands which would be discharged by a certificate under a *fiat* in bankruptcy of even date with the insolvent's petition. It is in terms so enacted by the 60th section of the Act, and I can find nothing in the context of the Act which can control that enactment. This section * 90 indeed refers in the early part of it to the schedule which the insolvent is required to file, but it seems to me to be clear that the discharge was not intended to be confined to the debts enumerated in the schedule, for throughout the Act continual reference is made to debts not included in the schedule, and such debts are treated as standing on the same footing as debts admitted by the schedule. Sections 17, 22, 25, 40, and 47 may be referred to as instances of this, but section 38 seems to me to be more strong, if not decisive upon the point. That section gives a right to a creditor omitted in the schedule to prove and receive dividends, and it surely could not be intended that a creditor should be so entitled, and should at the same time have a right to recover his debt, notwithstanding the order absolute. It is to be observed, too, that the schedule was to contain not merely an enumeration of the debts, but an account of the property of the insolvent, and it may well be that the legislature did not intend that an insolvent should have the benefit of a certificate until he had rendered an account of his property.

Assuming then that the discharge was not intended to be limited to the debts in the schedule, was it intended to be limited to those debts, and to such other debts as might, to use the language of the Act, be established under the insolvency? I see nothing in the Act which can warrant this construction, and on the contrary I think there is much to be found in it which is unfavourable to such a limit, and favourable to a general discharge having been intended. The Act contains very careful provisions for the protection of the interests, not merely of the creditors in the schedule, but of all the creditors. These provisions are to be found in

sections 36, 37, 40, and 43. They are to be found too in sections 43, 59, and 60, the former of which provides for one-third of * 91 * the estate being retained until twelve months after notice in the London Gazette, and the two latter of which also provide for notices in the same gazette, but they are, I think, more fully developed in the later sections of the Act, by which the proceedings under the insolvency may be made the foundation of an English bankruptcy, under which all creditors are to be admitted, and amongst these provisions there is a very remarkable one contained in the 83d section. By that section it is provided, that where there is a *fiat* against the insolvent before the order for discharge in the nature of a certificate is made, the order is not to discharge the debts of creditors who have not been within the limits of the presidency between the filing of the petition and the date of the order absolute ; an enactment which seems to me to assume that those debts would, in the absence of it, be discharged. The whole scope of the Act seems to me to be to place an insolvent trader, who has obtained an order absolute for his discharge, on the footing of a certificated bankrupt.

This being my view of the operation of the order absolute under the Act, it remains to be considered whether Mr. Parbury's liability in respect of the shares which he held was barred by that order, and whether any beneficial interest which he may at the period of his insolvency have had in the assets of the company was taken from him by the proceedings under the insolvency. I am of opinion that, although these shares do not appear to have been mentioned in the schedule filed by Mr. Parbury under the Act, any beneficial interest which he may have had in respect of them must, under the 7th section of the Act, have passed to the official assignee, and I am of opinion also that any liability in respect of the shares was barred by the order absolute. This is not the case of * 92 a continuing company in which there * might, according to the decisions at law, be a right of election in the assignees whether they would take the shares or not. It is the case of a company the business of which was at an end, which was ordered to be wound up long before the insolvency. From the date of the winding-up order at the latest, Mr. Parbury was in the position of a partner in a dissolved partnership. He was liable to pay his share of the debts and liabilities upon a proper account being taken, and what was due upon that account was, as I apprehend,

a debt which might have been claimed and proved under his bankruptcy if he had become bankrupt. The case in this respect, although it may differ in circumstances, does not seem to me at all to differ in principle from *Chappell's Case* and *Greenshield's Case*.

It was suggested in the course of the argument that Mr. Parbury, though not liable for the debts, might be liable for the costs of the winding-up, down to the date of the order absolute, and that these costs being unascertained at the date of the order absolute could not be barred by it, and that Mr. Parbury, therefore, ought to be retained upon the list in respect of this liability; but it does not seem to me that the liability in respect of the debts and of the costs can under the circumstances of this case be separated. *Robinson's Executors' Case*, which was cited on the part of the official manager, does not seem to me to have any bearing on the case. The question in that case was, not whether the executors were liable for the call, but whether the call for which they were liable was a specialty or simple-contract debt. Here the question is, whether Mr. Parbury is under any liability at all. Upon the whole case I am of opinion that he is not, and that his name ought to be taken off the list. It is unnecessary, therefore, to enter more fully than I have done into the second part of the case.

* In the Matter of GEORGE JAMES NICHOLSON, a * 93
Solicitor.

And in the Matter of 6 & 7 VICT. c. 73.

1861. February 25, 26, 27. Before the LORDS JUSTICES.

N. acted as solicitor of J. from 1833 to 1857, and during that period received and paid large sums of money on his account. In November, 1853, N. delivered to J. his account current from 1833 to that time, and in it took credit for twenty-seven bills of costs, which he delivered at the same time. N. afterwards, in February, 1857, and June, 1857, delivered continuations of his accounts, taking credit in them for subsequent bills of costs, which were delivered along with the accounts in which they were included. None of the accounts were ever settled. In July, 1857, the relation of solicitor and

client was determined, and J. placed the matter in the hands of a fresh solicitor. In March, 1858, the last account was delivered, with another bill of costs. In April, 1858, J. presented a petition for taxation of all the bills, showing considerable items of overcharge. *Held*, that a taxation of all the bills ought to be directed, though most of them had been delivered more than twelve months before the petition was presented.

THIS was a petition by way of appeal from the Master of the Rolls, the object being to obtain taxation of a large number of bills of costs, amounting in the whole to about 4000*l.*, most of which had been delivered more than twelve months before the original petition at the Rolls had been presented.

From the year 1833, down to the year 1857, Mr. Nicholson was the attorney and solicitor of the petitioner, and acted as such in several actions at law and suits in equity, and in various matters of conveyancing and in other business. Mr. Nicholson also received and paid large sums of money on account of the petitioner, and there was an account current between them in respect of such receipts and payments.

In November, 1853, Mr. Nicholson delivered to the petitioner his account current, extending from 1833 to September, 1853. The receipts with which Mr. Nicholson debited himself were upwards of 77,000*l.*, and the result was a balance of 312*l.*

* 94 8*s.* 11*d.* due from Mr. * Nicholson to the petitioner. In this account Mr. Nicholson took credit for twenty-seven bills of costs, amounting to about 3500*l.*, which bills he delivered to the petitioner at the same time. He also delivered a bill of costs for business done for the petitioner as executor of his brother.

In May, 1856, a subsequent account current was delivered, in which Mr. Nicholson debited himself with the above balance of 312*l.* 8*s.* 11*d.*, and with sums subsequently received, amounting in all to 23,398*l.*, the result being a balance of 211*l.* 15*s.* 6*d.* due to him from the petitioner. Mr. Nicholson took credit for the amount of ten bills of costs, which were delivered at the same time with the account. In February, 1857, a continuation of the account current was delivered, showing a balance of 39*l.* 3*s.* 9*d.* due from the petitioner, and in June, 1857, a fourth account was delivered showing a balance of 418*l.* 12*s.* 10*d.* due from the petitioner. In this last account Mr. Nicholson took credit for the amount of four bills of costs, which were delivered at the same time. Previous to this a long correspondence had been going on between the

petitioner and Mr. Nicholson about the bills of costs, with which the petitioner was extremely dissatisfied, and in July, 1857, the relation of solicitor and client between them was finally closed by the petitioner placing the matter in the hands of his present solicitors. In March, 1858, the last account current was delivered, and credit taken in it for another bill of costs delivered at the same time. The balance appearing due from the petitioner was 31*l.* 6*s.* 6*d.*, in addition to the balance due on the last previous account. None of these accounts were ever settled.

In April, 1858, the petitioner presented a special petition for taxation of the bills, offering to bring into * Court the * 95 sums of 41*l.* 12*s.* 10*d.* and 31*l.* 6*s.* 6*d.*, appearing upon the accounts current to be due from him. The petitioner alleged, as special circumstances entitling him to taxation notwithstanding the lapse of more than twelve months since the delivery of most of the bills, that the bills contained many gross overcharges and such as the petitioner was advised were considered as fraudulent by the Court, amounting, as the petitioner was advised and believed, to upwards of 700*l.* As evidence of the bills containing gross overcharges, the petitioner set forth instances of alleged overcharges of different kinds contained in the bills of costs, and arranged objections to the bills under different heads, specifying under each head a number of particular instances of overcharges falling under such head.

On 26th July, 1858, the Master of the Rolls made an order directing the petitioner to pay the two sums amounting to 44*l.* 19*s.* 4*d.* into Court, and ordering Mr. Nicholson thereupon to deliver up all deeds, &c., to the petitioner; such payment and delivery of documents to be without prejudice to any question, and the rest of the petition was adjourned.

The petition again came on before the Master of the Rolls on the 4th of November, 1858, when, after the respondent's case was closed, his Honor proposed to the counsel on both sides, that his Honor should consider the case and look into the petition and affidavits and bills of costs, and in case he should hold the petitioner entitled to a taxation, his Honor would (both parties consenting) decide, with the aid of a taxing master, whether any and what deductions should be made from the bills of costs, and whether any and what additions, by way of surcharge, should be made to the cash account, the parties being willing to waive the

* 96 *production of vouchers before his Honor, except when his Honor might consider it necessary or proper to call for them.

The petitioner and Mr. Nicholson, by their counsel, consented to such course being taken, it being, as the petitioner alleged, expressly understood that in case the Master of the Rolls, upon looking into the bills of costs and affidavits, should be of opinion that he could proceed in the manner proposed, then the petitioner should be at liberty to lay before him a detailed statement of the particulars of the overcharges complained of by the petitioner, in order that such statement should be considered by his Honor. The further hearing of the petition was then adjourned.

On the 24th of November, 1858, a clerk of Mr. Nicholson called on the petitioner's solicitor, and stated to him that his Honor required the affidavits and bills of costs. They were accordingly delivered, and no further communication was received by your petitioner's solicitors, until the matter was put into his Honor's paper for judgment on the 13th of January, 1859.

On the 13th of January, 1859, his Honor stated that with the assistance of his chief clerk he had gone through the bills of costs and had taxed off the sum of 319*l.* 4*s.* 8*d.*, and that under the circumstances he did not think it was a case for costs on either side, and that as to the cash account the parties would be at liberty to lay statements before him for the purpose of surcharging and falsifying, or supporting the accounts.

Counsel for the petitioner thereupon submitted to his Honor that the course which had been taken was not in pursuance
* 97 of the consent given by the petitioner, as the *petitioner had not had an opportunity of laying before his Honor a statement of the items objected to in the bills of costs. It then appeared that his Honor in asking for papers had intended that the parties should at the same time lay before him such statements as they thought necessary to enable him to decide as to the items to be taxed off.

On the 19th of February, 1860, the petitioner served upon Mr. Nicholson a notice of motion that the order pronounced by his Honor on the 13th of January, 1859, might not be drawn up, and that in pursuance of the consent given by the petitioner and the respondent on the hearing of the petition on the 14th of November, 1858, the petitioner might be at liberty to lay before his Honor a

detailed statement of the overcharges complained of in the bills of costs, and that such statement might be taken into consideration by his Honor, and such order made thereon as should be just, or otherwise, that, notwithstanding such consent, the petition might be reheard.

By a consent order made on the 9th of March, 1859, on the hearing of the motion, it was ordered that the petitioner should be at liberty to carry in before his Honor in Chambers a detailed list of the items to which he objected in the bills of costs, with a statement of his grounds of objection and references to such parts of the bills and affidavits respectively as related thereto; and also a similar list of the items to which he objected, or which he sought to add by way of surcharge in the cash account, and that these lists, with the explanations accompanying them (which were not to go into any arguments), were, before being laid before his Honor, to be communicated to Mr. Nicholson, who was to be at liberty to deliver to his Honor at Chambers answers to * the * 98 several objections and claims (also not going into any arguments), and both parties were thereupon to sign the said list and answers, and to deliver them to his Honor, who would then proceed to moderate the said bills, and settle the said cash account.

On the 20th of December, 1859, in pursuance of this order, the solicitor of the petitioner delivered to Mr. Nicholson, —

1. A statement of the principles on which the chief objections to the said bills of costs were based, in which statement such principles were distinguished by the letters A to N.

2. The said bills of costs interleaved and every objectionable item distinguished, and the amount of the objectionable charge taxed off in the inner half of the blank pages, and opposite the objectionable items, leaving the other half of the said pages for the observations of Mr. Nicholson in answer.

3. A statement of objections and queries as to Mr. Nicholson's cash accounts.

Difficulties having been found in carrying out this order, from the refusal of Mr. Nicholson to sign the list of objections and answers, the petitioner on the 20th of November, 1860, presented a petition to the Master of the Rolls, stating in detail the difficulties the petitioner had experienced in carrying out the last-men-

tioned order, and praying that such directions might be given as should be necessary for carrying into effect the order of the 9th of March, 1859, or otherwise that it might be referred to one of the taxing masters of this Court to tax the bills of costs, with the usual directions, or with such other directions as should be just under the circumstances of the case, and that if necessary the

* 99 * petition might be reheard, and such order made thereon as should be just.

By an order dated the 15th day of December, 1860, made by the Master of the Rolls on the hearing of the last-mentioned petition and of so much of the first petition as was adjourned by the order of the 26th of July, 1858, it was ordered that the order of the 9th of March, 1859, should be discharged, and that the first petition should be dismissed without costs but without prejudice to the order of the 26th of July, 1858, and with liberty to apply as to the sum of 449*l.* 19*s.* 4*d.*, cash in Court, and as to the documents mentioned in the order of 26th July, 1858: and his Honor did not think fit to make any order upon the last petition.

Mr. Johnson appealed.

Mr. R. Palmer and Mr. Archibald Smith, for the appellant. — As regards most of the bills it is necessary to show special circumstances, they having been delivered more than a year before the petition was presented. As one special circumstance, we show gross overcharges: it is not necessary that they should be such as to show an actual fraudulent intent. *Re Strother*, (a) *Re Williams*. (b) Then again the bills are excessively voluminous, extending over twenty-seven years and requiring a long time for their examination. They are mixed up with an unsettled cash account extending over twenty-three years, and were not dealt with separately. The cash account never having been settled, the case cannot be set up that the bills were paid. *Re Bignold*, (c) *Re Steele*. (d)

* 100 * *Mr. Lloyd and Mr. Leach*, for the respondent. — The bills ought to be treated as paid, having been included in accounts which were never objected to: and, at all events, as they were delivered more than twelve months before the petition was presented, it is necessary for the petitioner to make out over-

(a) 3 K. & J. 518.

(c) 9 Beav. 269.

(b) 15 Beav. 417.

(d) 20 L. J. Ch. 562.

charges amounting to evidence of fraud. *Re Dickson* (a) was a peculiar case, and went upon the principle that the solicitor of an executor must not charge against the executor what the executor would not be allowed against the estate. *Re Strother* (b) proceeded on a misapprehension of *Re Dickson*. In *Horlock v. Smith* (c) there was a payment, but delivery for twelve months comes to the same thing, and, bearing this in mind, *Cooke v. Setree*, (d) *Plenderleath v. Fraser*, (e) *Gretton v. Leyburne*, (g) and *Re Boyle*, (h) are all against the petitioner. There has been most unreasonable delay: no objection was taken to the account till April, 1856, nor to the bill of costs till April, 1857.

[THE LORD JUSTICE KNIGHT BRUCE. — Is the delivery of a bill while the solicitor continues to transact the client's business, and a dispute between them must probably inconvenience the client, the same thing as the delivery of a bill when the employment has ceased?]

The Act draws no distinction between the two cases.

[THE LORD JUSTICE KNIGHT BRUCE. — May not possibly the continuance of the employment be a "special circumstance?"]

It is admitted that there are some overcharges, but they are not gross ones; nothing like overcharge amounting to fraud.

[THE LORD JUSTICE TURNER. — Suppose the bill such that it would be the duty of an independent solicitor to advise his client not to pay it without taxation.]

There is no authority *deciding that to be a sufficient *101 ground for ordering taxation after the twelve months. There has been a delay on the part of the petitioner sufficient to bar him of all title to the relief he asks. *Re Whicher*, (i) *Re Barnard*, (k) *Ex parte Pemberton*. (l) The objections specified only apply to some

(a) 3 Jur. N. S. 29, Lds. Js.

(b) 3 K. & J. 518.

(c) 2 Myl. & Cr. 495.

(d) 1 Ves. & Bea. 126..

(e) 3 Ves. & Bea. 174.

(g) T. & R. 407.

(h) 5 De G., M. & G. 540.

(i) 13 M. & W. 549.

(k) 2 De G., M. & G. 359.

(l) 2 De G., M. & G. 960.

of the bills, and at all events taxation ought not to be ordered as to the other bills.

THE LORD JUSTICE KNIGHT BRUCE. — This is an application to tax forty-six bills of costs. The original petition was presented in April, 1858. The first of the bills had been delivered in November, 1853, and the latest were delivered within twelve months next before the presentation of the petition. At the time, therefore, when the original petition was presented there could not have been any objection to directing taxation of the bills to which I have referred as last delivered, nor can any objection be made to ordering their taxation now, for if they were not the proper subject of a special petition, yet that circumstance cannot avail to make time run, a petition for their taxation having been presented within the year.

As regards the other bills, the first objection raised is that they have been paid, and it is said that as the gross amount of the bills was carried into cash accounts which were from time to time delivered to the petitioner, this ought to be treated as payment; no objection, it is alleged, having for a long time been made to the accounts. There has not, however, as I understand the evidence, been any thing in the nature of a settlement of accounts, and therefore I think that in no sense for any purpose

* 102 * at present material can the bills be treated as having been paid. If there be any objection to taxation it can, as I conceive, be only on the ground of lapse of time; the great majority of the bills having been delivered more than twelve months before April, 1858. But it must be remembered that the relation of solicitor and client, the employment of the solicitor by the client, continued till a time within a year next before the presentation of the petition. I do not mention this as decisive of the question whether time ought to be considered as having run, but it is a circumstance to be attended to, for it seems impossible to say that a bill delivered after a dispute and after a disruption of the connection between the solicitor and client can stand exactly on the same footing as a bill delivered during that connection and during the continuance of the confidence arising from it. In the next place several of the bills contain charges, some altogether erroneous, some erroneously large, some the propriety of which is doubtful; some of the charges, and those not small in amount, it is admitted

cannot be maintained at all ; some it is admitted cannot be maintained at their amount. On these grounds I am of opinion that a general taxation ought to be directed, subject to certain guards for preventing useless expense. The question of costs will require attention in the reply.

THE LORD JUSTICE TURNER. — I concur in the judgment of my learned brother, and have little to add. It is necessary that the items should be investigated and the lapse of time is the only thing that raises any doubt. But it must be remembered that there is a general open account between the parties, and that these bills form items in that account, and it cannot well be said that these bills which constitute mere items * in the account can be * 103 treated as more settled than the rest of the account.

Mr. Palmer having been heard in reply, their Lordships decided that no costs should be given up to the present time, and the following order was made.

Notwithstanding the orders of 26th July, 1858, 9th March, 1859, and 15th December, 1860, it is referred to Mr. F., one of the taxing masters of this Court, to moderate and settle the several bills of costs delivered by the said G. J. Nicholson to the petitioner, the petitioner undertaking to admit that all the business charged for on the face of the said bills and therein stated to have been done has been actually done, and that the length of all documents is as stated in the said bills, and also undertaking not to call for vouchers for any payments out of pocket charged in the said bills and therein stated to be paid ; but with liberty to the petitioner to object to the propriety of such business, documents, and payments, and to the propriety of the charges made in the said bills in all other respects than as aforesaid, and with liberty to the taxing master to call for the production of any documents for the purposes of explanation, and to call upon the respective parties for any explanation as to any of the items charged in the said bills as in his discretion he may think fit. That the said G. J. Nicholson do give credit for all sums of money by him received of or on account of the petitioner, and be at liberty to charge all sums of money paid by him to or on account of the petitioner.

[Usual direction for costs to be paid by the petitioner or by

delivered up all the documents in his possession or power, and no evidence that there are any documents in his possession or power which he has not delivered up. I think, therefore, that he should be immediately released, and that he should have his costs of this application.

THE LORD JUSTICE TURNER. — I am entirely of the same opinion.

1861. March 2, 6. Before the Lord Chancellor Lord CAMPBELL.

Under a composition deed, the benefits of which were in terms limited to creditors who should come in and accede to the deed within a limited time, certain creditors, who neither assented to nor dissented from the deed during such time were, under the circumstances, afterwards admitted to share in the benefit of the composition together with those who had acceded before the expiration of the stipulated time.¹

Although the deed contained no release or stipulation that the dividend was to be taken in full satisfaction of the debts: *Held* that satisfaction ought to be inferred as the deed constituted a *cessio bonorum*.²

THIS was an appeal from the decision of Vice-Chancellor Wood, reported in Messrs. Johnson and Hemming's Reports. (a)

(a) Vol. 1, p. 444.

¹ See *Lewin Trusts* (5th Eng. ed.), 389, 390; *Perry Trusts*, § 593; *Halsey v. Whitney*, 4 Mason, 206; *Tennant v. Storey*, 1 Rich. Eq. 222; *Pierpont v. Graham*, 4 Wash. C. C. 232; *Stoddart v. Allen*, 1 Rawle, 258; *Dedham Bank v. Richards*, 2 Met. 105; *Phoenix Bank v. Sullivan*, 9 Pick. 400; *De Caters v. Chaumont*, 9 Paige, 490; 1 Lead. Cas. in Eq. (3d Am. ed.) [212], [213], 307, 326, 327; *Adam's Eq.* (5th Am. ed.) [31] 106, note (1); 2 Kent, 533, and notes. In the United States, if an assignment, not fraudulent, is made to trustees for the benefit of creditors, their assent is not necessary; or their assent will be presumed in all cases, if it is for their benefit, and contains no unusual clauses or restrictions. *Perry Trusts*, § 593, and cases cited to this point in note; *Moses v. Murgatroyd*, 1 John. Ch. 129; *Nicoll v. Mumford*, 4 John. Ch. 523, 529; *Brooks v. Marbury*, 11 Wheat. 78; *Halsey v. Whitney*, 4 Mason, 206; *New England Bank v. Lewis*, 8 Pick. 113; *Houston v. Nowland*, 7 Gill & J. 480; *Smith v. Leavitt*, 10 Ala. 93; *Rankin v. Duryer*, 21 Ala. 392; *Gray v. Hill*, 10 Serg. & R. 436; *De Forrest v. Bacon*, 2 Conn. 633; *Reinhard v. Bank of Kentucky*, 6 B. Mon. 252; *Ingraham v. Kirkpatrick*, 6 Ired. Eq. 463; *Stimpson v. Fries*, 1 Jones Eq. 156; *La Touche v. Earl of Lucan*, 7 Cl. & Fin. (Am. ed.) 772, note (1).

² See *Chitty Contr.* (9th Eng. ed.) 720, 721.

The principal question argued upon the original hearing and upon the appeal was, whether, under a composition deed, the benefits of which were in terms limited to creditors who should execute or accede to the deed within a limited time, certain creditors who neither assented to, nor dissented from, the deed during such time, could afterwards be admitted to share in the benefits of the composition, together with those who acceded before the stipulated time.

Besides this question of law, there was also an issue of fact, whether the plaintiffs did or did not in fact accede within the limited time.

The bill was filed by the trustees of an assurance company, who were mortgage creditors of John Lawford and Edward Lawford on behalf of themselves and all the other creditors. On the 15th November, 1854, the two debtors, John and Edward Lawford, being in a hopeless state of insolvency, and on the eve of leaving the country, executed two deeds, similar in form, by which they respectively assigned all their property to the defendant Turquand, upon trust for such of their creditors as should execute or accede to the deeds respectively within three calendar months.

In those deeds the *creditors who should execute were *108 made the parties of the second part, but it did not appear that any creditor had executed either of the deeds. Several creditors, however, distinctly acceded to them within three months.

Neither of the indentures contained any release, letter of license, or covenant not to sue.

The bill prayed for the execution of the trusts of the deed.

The nature of the evidence upon the issue of fact sufficiently appears from the judgment appealed from.

The principal arguments of counsel are considered in the judgments of the Vice-Chancellor and of his Lordship.

The following authorities were referred to: *Dunch v. Kent*, (a) *Spottiswoode v. Stockdale*, (b) *Garrard v. Lord Lauderdale*, (c) *Walwyn v. Coutes*, (d) *Field v. Lord Donoughmore*, (e) *Lane v. Husband*, (g) *Collins v. Reece*, (h) *Johnson v. Kershaw*, (i) *Broad-*

(a) 1 Vern. 260.

(b) G. Coop. 102.

(c) 3 Sim. 1; 2 R. & Myl. 451.

(d) 3 Meriv. 707.

(e) 1 Dr. & War. 227.

(g) 14 Sim. 656.

(h) 1 Coll. 675.

(i) 1 De G. & Sm. 260.

bent v. Thornton, (a) Nicholson v. Tutin, (b) Raworth v. Parker, (c) Forbes v. Limond, (d) Biron v. Mount, (e) Davis v. Battine. (g)

Sir H. Cairns and Mr. Daunev, for the plaintiffs.

Mr. Rolt and Mr. C. Hall, for defendant Turquand.

* 109 * *Mr. W. M. James and Mr. Batten, for the other defendants, the appellants.*

Sir. H. Cairns replied.

Judgment reserved.

March 6. .

THE LORD CHANCELLOR. — I agree with the opinion of Vice-Chancellor PAGE WOOD on both the questions raised by this appeal.

In the first place, I think he was quite right in holding that the plaintiffs had not acceded to the composition deed within three calendar months after the date thereof. They had not executed it, nor in any respect acted under it. *Sir Hugh Cairns* admitted, that to constitute "accession to the deed," there must be some overt act done by the creditor within the specified period, denoting that he was willing and intended to come in under the deed. The learned counsel relied on the signing of the letter of license by the plaintiffs. But this document made no allusion to the deed, and it was signed with a view of obtaining information as to the state of John Lawford's affairs, not for the purpose of carrying out the proposal contained in the deed, but to enable the creditors to judge whether it would be prudent to accept the terms of the deed or to make him a bankrupt. After carefully reading the minutes of the meetings held respecting the letter of license, the correspondence on the subject, and the affidavits detailing the transaction, I come to the conclusion that the signing of the letter of license was no accession to the deed.

* 110 It is quite clear that after the letter of license had * been

(a) 4 De G. & Sm. 65.

(b) 2 K. & J. 18.

(c) 2 K. & J. 163.

(d) 4 De G., M. & G. 298.

(e) 24 Beav. 642.

(g) 2 R. & Myl. 76.

signed, the rights of the plaintiffs as creditors of John Lawford were in no respect altered. They were still at liberty to take any steps which it was before competent to them to take for the purpose of obtaining payment of the debt due to them from him, and they had acquired no interest under the composition deed. When, after the lapse of some years, they did accede to the composition deed, their rights were the same under it as if the letter of license never had existed.

But when we come to the second question to be decided, considering that the plaintiffs had done nothing to repudiate the composition deed; that the debtor remained in the same situation as when the composition deed was executed; that there had been no dividend under it, and that no rights or liabilities were affected by the delay, I am of opinion that the plaintiffs were still entitled to accede to the deed, and to claim the benefit of it.

Since the case of *Dunch v. Kent*, (a) the doctrine of this Court has been that the time limited by such a deed for the creditors to come in is not of the essence of the deed. Although this deed contains no release nor declaration that the dividend is to be taken in full satisfaction of the debt, the arrangement is in the nature of a *cessio bonorum* under the Roman civil law; and I think that when the dividend has been received, satisfaction is to be inferred.

The insolvent cedes for the benefit of his creditors all that he has in the world "with the exception of the wearing apparel of himself and his wife." The counsel at the bar admitted that it would be rather foolish for a * creditor, after having * 111 executed the composition deed, and after the debtor had acted fairly under it, to sue out a *feri facias*, there being no goods on which it could operate, and that it would be rather harsh to proceed by *capias ad satisfaciendum* to imprison the debtor when imprisonment could not by possibility lead to the disclosure of any property, but they argued that it would be in the power of the creditor to do so. I am, however, of opinion that if the debtor acted honestly under the composition deed, and retained nothing that he could call his own beside the clothes worn by himself and his wife, the law would interpose to protect him from the supposed wanton oppression.

By the express terms of this deed, it is declared that the

arrangement shall be conducted on the principles of the bankrupt law. It contains a proviso "that the trust moneys applicable to the payment of the creditors shall be paid and applied, and the same rights and equities shall prevail in respect thereof, as if the said John Lawford had been duly declared and adjudged a bankrupt."

The intention was that all the creditors should come in and take a dividend, and that the debtor after this cession should be freed from his liability to these creditors. The deed was not for the benefit of any particular class of his creditors, but for all equally. The period of three calendar months is evidently introduced with a view to hasten the arrangement, and to authorize the trustees when that period has expired to make a dividend, which the subsequent claim of other creditors should not disturb.

This is the understanding which has long prevailed on the * 112 subject; and with this understanding, the supposed * hardship upon a creditor who executes the deed the last hour of the last day of the limited period does not exist: for if he thinks he is secure against any more creditors coming in afterwards, and feels confident that he must receive twenty shillings in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant of the law, which he ought to have known, as he ought to know the days of grace given for the payment of a bill of exchange.

I think it unnecessary again to go over the long list of cases cited in the argument, and most minutely analyzed and copiously commented upon by the Vice-Chancellor. I content myself with saying that I concur with his remarks upon them all, except the leading case of *Dunch v. Kent*. (a) Of that I think the first view taken by his Honor is the sounder one.

I likewise place great reliance on his own previous decision in *Nicholson v. Tutin*. (b) I therefore at once say, that I entirely approve of the declaration in this decree, "that the plaintiffs are entitled to the benefit of the deeds of trust in the bill mentioned, they having before the filing of their bill acceded thereto, and not having in any way acted inconsistently with their claiming to have the benefit of the same." The appeal must be dismissed with costs.

(a) 1 Vern. 260.

(b) 2 K. & J. 18.

* LEES v. MASSEY.

* 118

1861. February 13, 16. March 13. Before the Lord Chancellor Lord CAMPBELL and the Lord Justice TURNER.

A testator gave real estate to trustees upon trust to pay a moiety of the rents to his wife for life, and the other moiety for the maintenance of his daughter, and after the wife's death he gave all the estate to his daughter in fee, provided that if the daughter should die without lawful issue, the wife her surviving, then he gave the estate to his wife for life, and after her death "to my relations, share and share alike." He died almost immediately after making his will, and his daughter was his only child. She died without issue in the lifetime of the wife.

Held, that "relations" meant next of kin,¹ and that the period of ascertaining them was not to be postponed till the death of the widow; but whether they were to be ascertained at the death of the testator or of the daughter, *quære*. *Per* the Lord Chancellor, the death of the daughter was the period for ascertaining them.²

THIS was an appeal from a decision of the Master of the Rolls, turning upon the construction of the will of Thomas Smith.

Thomas Smith, by will dated the 1st of April, 1823, devised his real estate upon trust to pay a moiety of the rents to his wife Margaret Smith for her life, and as to the other moiety, to apply the same towards the maintenance of his daughter Margaret Smith, and after the decease of his wife he gave all his real estates to his daughter Margaret Smith, her heirs and assigns for ever. Then followed a proviso on which the present question arose:—

"Provided nevertheless, that in case of the decease of my said daughter Margaret Smith without lawful issue, and my said wife Margaret Smith her surviving, then, and in such case, I bequeath such last-mentioned estates to her my said wife for life, and after her decease to my relations, share and share alike."

The testator died in April, 1823.

Margaret Smith, the daughter, was at the date of the testa-

¹ See 2 Jarman Wills (3d Eng. ed.), 108.

² See 2 Jarman Wills (3d Eng. ed.), 116 *et seq.*

tor's will, and at his death, his only child, and so at
 * 114 * his death his heiress-at-law and sole next of kin. She
 afterwards died without issue in 1832, in the lifetime of
 Margaret Smith the widow. Margaret Smith the widow died in
 1857.

The testator had a sister, Ann Lees, who survived him, and also
 survived his daughter. If the testator had had no child, Ann
 Lees would have been his heiress-at-law and sole next of kin at
 his death. She was, at the death of Margaret the daughter, the
 sole next of kin of the testator and the heiress-at-law both of the
 testator and of his daughter Margaret.

After the death of the widow, the question arose who were
 entitled under the gift to the testator's "relations." The plain-
 tiffs, who derived title under Ann Lees, were entitled, if the
 period for ascertaining the relations who were to take was the
 death of the testator or the death of Margaret Smith the daughter.
 The appellants were the persons who answered the description of
 the testator's next of kin at the death of the widow.

The Master of the Rolls made a decree declaring that the word
 "relations" was equivalent to "next of kin," and that the class
 of next of kin was to be ascertained at the death of the testator.
 The present appeal was brought from the latter declaration and
 the directions consequent thereon.

Mr. R. Palmer and *Mr. Little*, for the appellants.—In this
 case the word used is "relations," and although the Court, to
 escape from the indefiniteness of the word, construes it next of
 kin according to the Statute of Distributions, yet the case stands
 on a different footing from one in which the Statute of
 * 115 Distributions * is referred to, as it was in *Bullock v.*

Downes. (a) A reference to the Statute of Distributions
primâ facie refers us to the death of the testator, and a stronger
 context is necessary to alter the period than in a gift containing
 no such reference. The gift here in question is in defeasance of
 an absolute gift to his only child, and he cannot have intended to
 substitute for it a gift which would take effect in her favour, which
 this would, according to the construction put upon the proviso by
 the Master of the Rolls.

[THE LORD CHANCELLOR. — He might have had other children.]

The will proceeds on the footing of his having only one child, and not expecting to have any more. *Jones v. Colbeck* (a) is almost identical with the present case, and supports our contention that the death of the widow is the period for ascertaining the class. Its authority is recognized in *Say v. Creed*, (b) *Bradley v. Barlow*, (c) and *Wharton v. Barker*. (d) In *Tiffin v. Longman*, (e) relations were ascertained at a future period. *Reyner v. Mowbray* (g) is an authority which we do not dispute, but it had nothing to take the case out of the ordinary rule. *Masters v. Hooper*, (h) is of the same nature; *Briden v. Hewlett*, (i) *Clapton v. Bulmer*, (k) are in our favour. The cases where the class has been ascertained at the death have nearly all been cases of a gift for life with remainder over. *Ware v. Rowland*, (l) *Bird v. Luckie*, (m) *Gundry v. Pinniger*, (n) *Cable v. Cable*, (o) *Downes v. Bullock*, (p) is in the same category. Where *the * 116 gift is not simply in remainder, but takes place in substitution for a previous gift, it is repugnant and absurd to construe the substituted gift so as to make it apply only in favour of the first taker, when the testator must have known that person to be the only person who could answer the description if applied to the time of his death. The death of the testator, therefore, cannot be the period for ascertaining the class, and the words must be referred to the period of distribution.

Mr. Selwyn and *Mr. Leonard Field*, in support of the decree. — *Downes v. Bullock* is in substance the same as the present case. It is established that giving a particular interest to an individual does not in the least affect his right to take under a gift over to persons answering a certain description. In *Seifferth v. Badham*, the principle is shown; the testator makes specific dispositions up to a

(a) 8 Ves. 38.

(b) 5 Hare, 580.

(c) 5 Hare, 589.

(d) 4 K. & J. 483.

(e) 15 Beav. 275.

(g) 3 Bro. C. C. 284.

(n) 14 Beav. 94; 1 De G., M. & G. 502.

(o) 16 Beav. 507.

(h) 4 Bro. C. C. 207.

(i) 2 Myl. & K. 90.

(k) 5 Myl. & Cr. 108.

(l) 2 Phil. 635.

(m) 8 Hare, 301.

(p) 25 Beav. 55.

certain point, then leaves the property to devolve according to law.

[THE LORD JUSTICE TURNER. — That is a good argument in favour of holding a gift to next of kin to apply to those answering the description at the death, but does it apply to a gift to “relations” ?]

Tiffin v. Longman, which is used against us, is explained in *Gorbell v. Davison*. (a) No substantial distinction can be drawn from the fact that the Statute of Distributions is not mentioned; it still comes to a question of the time for ascertaining a class, and a general rule must prevail unless there are words to vary it. The arguments on the other side are disposed of by the judgments in *Ware v. Rowland*, (b) *Seifferth v. Badham*, (c) and *Pearce v.*

Vincent. (d) The argument there was, that the tenant for * 117 life ought to be excluded, and if there be * any inference at all from the circumstance of the tenant for life being a person who must constitute or be a member of the class in whose favour the ultimate gift is made, it would be that the tenant for life ought to be excluded, not that a different time for ascertaining the class ought to be chosen, and so said Vice-Chancellor KINDERSLEY in *Lee v. Lee*. (e) *Urquhart v. Urquhart* (g) was very like this case, and there the next of kin at the death of the testator took.

[THE LORD JUSTICE TURNER. — Was *Say v. Creed* (h) referred to ?]

No, it was later in date. The principles laid down in *Gundry v. Pinniger* (i) are in our favour, though the circumstances were too dissimilar for the case as a whole to have any bearing on the present. *Jones v. Colbeck* has been unfavourably observed upon in *Ware v. Rowland*, (b) *Urquhart v. Urquhart*, (k) *Ford v. Ford*, (l)

(a) 18 Beav. 556.

(b) 2 Phil. 635, 639.

(c) 9 Beav. 370, 374.

(d) 2 Keen, 230.

(e) 8 W. R. 443.

(g) 13 Sim. 613.

(h) 5 Hare, 580.

(i) 1 De G., M. & G. 502.

(k) 13 Sim. 613, 627.

(l) 6 Hare, 486, 495.

Wharton v. Barker, (a) *Lee v. Lee*, (b) and *Re Barber's Trust*. (c) We rely on *Rayner v. Mowbray*, (d) *Masters v. Hooper*, (e) *Bird v. Luckie*, (g) *Holloway v. Holloway*, (h) and *Wilkinson v. Garrett*, (i) as being in our favour, and in the last of these cases the gift over was in derogation of a prior absolute gift, as in the present case.

Mr. Renshaw and *Mr. Kekewich*, for other parties.

Mr. Palmer, in reply. — It is dangerous to rely on general expressions without regard to the circumstances of the particular cases in which they were used. The observations upon *Jones v. * Colbeck* which have been referred to, are directed * 118 against its being treated as laying down a general rule. They do not impeach it as an unsound decision upon the construction of the instrument to which it relates. The cases cited against us may be divided into two classes. First, cases in which there is a simple gift for life, with remainder to the next of kin, relations, or heirs-at-law. The general rule in favour of early vesting there fixes upon the death of the testator as the period for ascertaining the class. *Masters v. Hooper*, *Lee v. Lee*, *Pearce v. Vincent*, and *Wilkinson v. Garrett* are all of this class; the last case not being one in which the gift over was in derogation of a prior gift, but a case of alternative limitation. Secondly, cases in which there are introduced into the will words of contingency or futurity, or apparent contingency or futurity, but with a reference to the Statute of Distributions, which reference points to the testator's death, and prevents the words of contingency or futurity having effect. *Bullock v. Downes*, *Seifferth v. Badham*, *Bird v. Luckie*, and *Holloway v. Holloway* are all of this class. These are two classes of cases to which the general rule is applicable, and we do not ask the Court to shake it. The present is not such a case, nor is any case referred to on the part of the respondents as being at all like the present, except *Urquhart v. Urquhart* and *Wilkinson v. Garrett*. But *Urquhart v. Urquhart* is in reality quite unlike the present case. Nothing was there given to the daughter except on a contingency which did not happen, and the will was so framed that if the word "daugh-

(a) 4 K. & J. 483.

(b) 8 W. R. 444.

(c) 1 Sm. & Gif. 118, 122.

(d) 3 Bro. C. C. 234.

(e) 4 Bro. C. C. 207.

(g) 8 Hare, 301.

(h) 5 Ves. 399.

(i) 2 Coll. 643.

ter" had been written instead of "next of kin," the will would have been perfectly logical and consistent. In *Wilkinson v. Garrett* there was no gift to the son unless he attained twenty-five; if he did not, the testator gave the property to his own heirs, executors, or administrators, which was in effect saying "in that * 119 event let the law take its course." * Here the testator gives to a person who, as he well knew, would be his sole heiress-at-law and next of kin, an absolutely vested interest, and then provides for its being taken away in certain events, giving it over to his "relations," without any reference to the course in which the law would carry it, and describing the objects of gift by a word which can only mean heir-at-law or next of kin by legal construction. To apply the ordinary rule here makes the testator take the property away from his daughter in a certain contingency, only to give it back to her by another description; for, looking at the frame of this will, he clearly cannot be considered to have contemplated having other children, the will being so framed, that if the daughter died in his lifetime there would be a complete intestacy beyond the widow's interest. In such a case as this, *Jones v. Colbeck* applies. The *ratio decidendi* of Sir W. GRANT has not been rejected in later decisions, as has been contended. In *Wharton v. Barker*, (a) the Vice-Chancellor, though he says that the circumstance of the tenant for life being the sole next of kin is not alone enough to vary the construction, treats it as being a material element in ascertaining the construction, and I do not dispute his view.

[THE LORD CHANCELLOR. — What principle of law do you contend to be laid down in *Jones v. Colbeck* ?]

I do not treat it as laying down any general rule, but I treat it as deciding that a gift to relations will not be so construed as to make it take effect in favour of a person who at the death of the testator was the sole next of kin, and had an absolute gift made to her in a particular event and taken away in favour of the "relations" in another particular event. This case possesses all the elements on which Sir W. GRANT went in *Jones v. Colbeck*, * 120 and is a still stronger case, there not having there been * an exhaustive gift of every thing in the first instance to the

(a) 4 K. & J. 483.

daughter and a taking away of it in a certain event. Then as to the argument that the class may be ascertained at the daughter's death, there is no authority for ascertaining a class at any other period than either the death of the testator or the period of distribution. The word "relations" does not point to any time, and there is no ground for assuming an immediate period. Where there is a contingent gift not vesting at the death of the testator, and there is nothing to point to any particular time, the period of distribution is the time of vesting. *Leake v. Robinson*, (a) *Leeming v. Sherratt*. (b)

Judgment reserved.

March 13.

The Lord Chancellor, after stating the facts of the case, proceeded as follows:—

All parties agree that the word "relations" in the will is equivalent to "next of kin," and the question is, at what time was the class of next of kin to be ascertained; on the death of the testator; on the death of his daughter; or on the death of the widow?

The Master of the Rolls decided, according to the general rule, that the death of the testator was the true time. But the respondents will be entitled to succeed if it was either the death of the testator or the death of the daughter; and the appellants must make out that the true time was the death of the widow.

The general rule was considered perfectly well settled in the late case of *Bullock v. Downes* in the House of * Lords; * 121 and indeed it was fully admitted by *Mr. Palmer*, counsel for the appellants. But he truly said there are exceptions to that rule,—either where the testator introduces an adverb of time expressly postponing the period, or where there are limitations in the will inconsistent with his intention being that the class should be ascertained at his own death.

Such limitations I do think are to be found in this will. The testator gives to his daughter, on the death of his wife, a fee-simple in his real estates; devising them to her *nominatim*, "to my said daughter Margaret Smith, her heirs and assigns." Can it be supposed that he really meant the same Margaret Smith, under the

(a) 2 Meriv. 363.

(b) 2 Hare, 14.

designation of "my relations" (meaning his next of kin) who were to take "share and share alike." He knew that she was his sole heir-at-law and sole next of kin. But the individuals to take, at the death of his daughter without issue in the lifetime of his widow, he did not know, and he describes them as a class, and he could hardly have meant this class to be ascertained at his own death.

Therefore, I cannot agree with the view of the case taken by the Master of the Rolls.

But still the remainder limited after the death of the widow must vest as soon as possible, and I can see no reason for postponing the time for that vesting later than the death of the daughter without issue in the lifetime of the widow. This may well have been the intention of the testator. What would be the state of his family at the death of his daughter without issue he could not tell; but having, in that event, no direct descendant, he probably meant to let in his collateral relations or next of kin, who could then be as well ascertained as at the death of his widow.

* 122 * Therefore, the rule of law and the intention of the testator seem to me to concur in fixing the death of the daughter as the time when the class should be ascertained and the remainder should vest.

I am not aware of any case in which it was held that the class should be ascertained at the death of the testator at variance with this construction of the present will; *Seifferth v. Badham*, (a) was chiefly relied upon by the appellants: but there is a manifest distinction between the testator's supposed intention in favour of or against particular persons, and a clear inference that from his designation of a person, and his description of a class, he could not have intended the person designated to form the class. I would avoid nice and refined distinctions in construing wills according to the caution of the Master of the Rolls in that case. *Jones v. Colbeck* is so far an authority, that where the intention of the testator is clearly expressed to postpone the ascertaining of the class beyond his own death, this intention is to be carried into effect.

Upon the whole, I am of opinion that the decree should be affirmed, but that as there was very reasonable ground for appealing, and we do not decide for the respondents on the same ground

(a) 9 Beav. 370.

taken by the Master of the Rolls, the appeal should be dismissed without costs, and the deposit should be returned to the appellants.

THE LORD JUSTICE TURNER. — In my opinion the decision of the Master of the Rolls is correct, and the appeal must be dismissed.

* The first question to be considered appears to me to be * 123 what estate did Margaret, the daughter, take? She may have taken an estate tail in one moiety immediate, and in the other moiety expectant on the death of Margaret the wife; or, which I think is the better opinion, she may have taken a vested estate in fee-simple liable to be divested in the event of her death without issue in the lifetime of Margaret the wife. If she took an estate tail, there is nothing, so far as I can see, which could prevent the remainder from immediately vesting in the relations, that is the next of kin, at the death of the testator; if, on the other hand, she took a vested estate in fee-simple liable to be divested in the event above referred to, the vesting might be suspended until the happening of that event, and might then take place in favour of the next of kin at the death of the testator or of the next of kin at the death of the daughter; but upon what ground could the vesting be suspended until the death of the widow, or could it take effect in favour of the next of kin at her death? Upon the happening of the event the limitations would stand thus: To the widow for life, with remainder to the next of kin of the testator; and the remainder of course would immediately vest and there would be nothing to divest it. The circumstance of the gift being to a class makes no distinction in this respect. *Smith v. Palmer* (a) is an authority which seems to me to have an important bearing upon this case. This case, indeed, seems to me to be more strong in favour of the vesting not being suspended until the death of the tenant for life, from the circumstance of the subject of the disposition being real and not personal estate, the rule in favour of vesting being more strong in the case of real than of personal property.

It was said, however, on the part of the appellants, * that * 124 the case of *Jones v. Colbeck* governs this case; but the case of *Jones v. Colbeck* appears to me to be clearly distinguishable.

(a) 7 Hare, 225.

In that case not only was the disposition of personal estate only, not of real estate, but the vesting, if suspended at all, was necessarily suspended until the death of the tenant for life. There was no intermediate period at which the interest of the next of kin could vest. Here, if the interest did not vest at the death, a question which the circumstances of the case render it unnecessary to decide, there is no ground for postponing the vesting beyond the death of the daughter, and the circumstance of the relations coming in, as they were clearly intended to do, by way of substitution for the daughter, is certainly not favourable to the vesting being suspended beyond the period of her death. With respect to the authority of the case of *Jones v. Colbeck*, which in the course of the argument was so much insisted upon on the one side and impeached on the other, it is not, I think, necessary for us to give any opinion, but I have no hesitation in saying that the ground on which the decision in that case rested seems to me to have been perfectly sound. The case, as I understand it, proceeded upon this, that the testator had, by his will, sufficiently indicated his intention that the property should go to his next of kin at the death of his daughter. Whether that conclusion was right or not, and I am by no means satisfied that it was wrong, it cannot, I think, be disputed, that if it was correct, the decision was well founded. In these cases, no less than in other cases of dispositions by will, the intention of the testator, if sufficiently expressed or indicated, must govern, and the question in each case must be whether the intention is sufficiently expressed or indicated. It is not a question which can be measured by rule. In determining it in cases of this

nature, the question must often be whether the testator has
 * 125 intended to give to those who may fill * a particular character at a particular time, or whether he has meant that the property should go as the law would give it; a question not, as I venture to think, to be determined, at all events where the disposition is of personal estate, without taking into consideration the distinction between gifts to next of kin simply and to next of kin according to the Statute of Distributions, and without bearing in mind also that if the property was meant to go as the law would give it, it may not have been necessary for the testator to express that intention. I agree with the Lord Chancellor in thinking that there should be no costs of this appeal.

In the Matter of THOMAS WOOD, a Person of Unsound Mind,
 AND
 In the Matter of The Trustee Act, 1850,
 AND
 In the Matter of the Trusts of the Will of GEORGE STORY.

1861. March 15. Before the LORDS JUSTICES.

The wife of a lunatic was the sole surviving trustee of a sum of stock. An order was made appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock.

THIS was a petition for the appointment of new trustees of the will of George Story, and for a vesting order.

The testator died in 1836, leaving a will by which he appointed his wife Amelia and two other persons his executors, and directed a sum of 1000*l.* to be laid out in government securities, and held on certain trusts for his widow and children.

The three executors proved the will, and, in pursuance of the above directions, invested 1000*l.* in their joint names in new 3*l.* per cent bank annuities.

* Some time afterwards the widow intermarried with * 126 Thomas Wood. In February, 1860, he was found a lunatic by inquisition, and, the other two executors having died, it had now become impossible to obtain payment of the dividends, as the bank would not pay them to the wife without the husband's concurrence.

The *cestuis que trust* presented a petition for the appointment of new trustees and a vesting order.

Mr. Marten, for the petitioners.

[The Lord Justice TURNER asked whether the husband could be considered a trustee within the meaning of the Trustee Act, 1850.]

The case is similar in principle to *Ex parte Bradshaw*, (a) where it was held that the husband of an executrix was a trustee

(a) 2 De G., M. & G. 900.

within the meaning of the 22d section. The husband in such a case as the present is the legal owner during the coverture, and has the sole power of disposition over the stock, though he has not a title which will devolve to his representatives. The case is clearly within the mischief intended to be remedied by the Act, and it is submitted that it comes within the terms of the Act. Sects. 2, 5, 32, 35; Williams on Executors. (a)

Mr. Caldecott, for the committee, asked for his costs out of the fund.

Their Lordships made the order as prayed, and gave the committee his costs out of the fund.

1861. March 18, 21. Before the LORDS JUSTICES.

A testator, after directing his debts to be paid by his executrix, gave his real and personal estate to her for life, and if she found the rents not sufficient for her maintenance and comfort, he gave her full power to mortgage the real estate so far as should be needful for her maintenance and comfort. *Held*, that the question, whether the executrix could sell the real estate for payment of debts, was too doubtful for the title to be forced upon a purchaser.¹

THIS was an appeal from a decision of the Master of the Rolls, that the executrix of Thomas Dawson was not able to make a good title to the estates devised by his will.

The testator's will, dated the 4th of July, 1859, was in part as follows:—

“First, I will and direct that all my just debts, funeral and testamentary expenses be fully paid and satisfied by my executrix

(a) Part 3, book 1, c. 4.

¹ See *Lewin Trusts* (5th Eng. ed.), 345, 346; *Perry Trusts*, § 803. It has become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title. 1 *Sugden V. & P.* (8th Am. ed.) 385, 386 note (d), and cases cited; *Collard v. Sampson*, 4 De G., M. & G. 224, note (1), and cases cited; 2 *Dan. Ch. Pr.* (4th Am. ed.) 989, and note (3); *Fry Specif. Perfor.* § 573 *et seq.*

hereafter named as soon as convenient shall be after my decease." [The testator then, after giving his personal estate to his wife for life, proceeded as follows:] "I give, devise, and bequeath to my wife Hannah Dawson all and singular my real estate situate and being at, &c. and elsewhere, and that she shall receive the rents, benefits, and annual proceeds thereof for and during the term of her natural life. And if my said wife finds that the net rents and proceeds of the said real estate be inadequate and not sufficient for her proper maintenance and comfort, I give her full power and authority to mortgage the said real estate as far as shall be needful for her maintenance and comfort."

After the decease of his wife, the testator limited the real and personal estates to a numerous class of persons, and appointed his wife executrix.

After the testator's death a creditors' suit was instituted, to which the widow was the sole defendant. A decree was made for sale of the real estate. The objection was taken by a purchaser under the decree, that the will gave the executrix no power to sell, and * that therefore a good title could not be made. * 128 The Master of the Rolls held that the title was bad, and discharged the purchaser. (a) From this order the present appeal was brought.

Mr. Roundell Palmer and *Mr. Nalder*, in support of the appeal.—A general direction in a will that the testator's debts shall be paid, will charge them on the real estate; a direction that the executor shall pay them will not in general do so; but where there is a devise of real estate to the executor, that takes away the restrictive effect of the direction that he shall pay, and the real estate is charged, at all events all the real estate over which he has a power of disposition; and here the executrix has a power of disposing of the fee by virtue of the authority to mortgage. *Cloudsley v. Pellham* (b) is in our favour. *Finch v. Hattersley* (c) is on all-fours with the present case, except that in that case there were no words sufficient to give the executrix any power of dealing with the fee,

(a) 29 Beav. 123.

(b) 1 Eq. Ca. Abr. 198; 1 Vern. 411; 2 Vern. 229.

(c) 3 Russ. 345, n.

which makes our case all the stronger. *Robinson v. Lowater* (a) shows that a charge of debts enables the executor to sell.

[THE LORD JUSTICE KNIGHT BRUCE. — Lord ST. LEONARDS has expressed a doubt as to the correctness of that decision; and a doubt from such a quarter deserves attention.]

In *Wrigley v. Sykes*, (b) the doctrine was perhaps carried too far. But we submit that the principle of *Robinson v. Lowater* is sound, that where there is a charge of debts, and the legal estate is so devised that there cannot be a sale by the devisees, the executors can sell. The direction that the executors shall pay * 129 the debts has been held not to charge the real * estates, because as the executor, *primâ facie*, can only deal with the personal estate, such a direction is held equivalent to a direction that they shall be paid out of the personal estate, but this does not hold where, as here, the executrix has the power of dealing with the fee. In fact it is questionable whether she does not take the fee. *Jarm. on Wills*. (c) *Dormay v. Borradaile*, (d) and the observation of Lord CAMPBELL in *Wolstencroft v. Wolstencroft*, (e) support our contention.

Mr. Giffard and *Mr. W. Pearson* appeared for the purchaser, but were not heard, and the case was adjourned till the 21st.

March 21.

THE LORD JUSTICE KNIGHT BRUCE. — To the suit, under the decree in which the sale before us has been made, not one of the testator's numerous devisees, except the executrix, has been made a party, nor is it shown that any one of them, except the executrix, has concurred in the sale, or confirmed it, or is willing to confirm it. Was then the sale which the decree directed ill and ineffectually directed by it? I think that it was, unless, at least, the will charged the fee-simple with the payment of the testator's debts. Did the will do so? This question of construction appears to me one of difficulty and doubt; of difficulty too great, and doubt too serious, to render the title one fit to be forced on a purchaser.

(a) 5 De G., M. & G. 272.

(d) 10 Beav. 263.

(b) 21 Beav. 337.

(e) 2 De G., F. & J. 347.

(c) Vol. 2, p. 225 (2d ed.).

The conclusion, therefore, in the present purchaser's favour, at which the Master of the Rolls has arrived, appears to me right.

* THE LORD JUSTICE TURNER. — This is one of those cases * 180 in which a Court of appeal ought not to disturb the order appealed from, except upon the clearest grounds. One Judge of the Court has pronounced the title bad: if we were to declare it good, our decision would not be binding on adverse claimants; and if a suit should be instituted to impeach the purchaser's title, a future Court of appeal might differ from us in opinion. The case ought, therefore, to be clear to demonstration before we interfere with the order discharging the purchaser. I have examined the authorities, and do not think the case by any means clear. The title may be good if *Finch v. Hattersley* ought to be followed, but I find that Judges of the Court have expressed doubts whether that case ought to be followed. I am of opinion, therefore, that the title in the present case ought not to be forced upon a purchaser.

* In the Matter of RICHARD BLANCHARD a Solicitor, * 181

AND

In the Matter of The Trustee Act, 1850.

AND

In the Matter of the Trusts of LE DOULCET'S Mortgage Deed.

1861. March 4, 5, 21. Before the LORDS JUSTICES.

The *cestuis que trust* under a deed, the trustee of which was a solicitor, presented a petition in the matter of the solicitor and in the matter of the Trustee Act, alleging that the trustee had taken the benefit of the Insolvent Acts, had repudiated the trusts, refused to discharge his duties as trustee and otherwise misconducted himself in the trusts, and praying the appointment of a new trustee in his place and a vesting order. The trustee denied or offered explanations of the various imputations against him, claimed a balance to be due to him, and objected to being removed from the trusteeship. An order was made by the Vice-Chancellor according to the prayer of the petition.

Held, on appeal, that the 32d section of the Trustee Act does not give the Court jurisdiction under the Act to displace a trustee who is desirous of continuing in the trust.¹

¹ See *Lewin Trusts* (5th Eng. ed.), 611, 767, note (c); *Coombes v. Brookes*, L. R. 12 Eq. 61, 63.

Held, also, that the trustee could not, under the summary jurisdiction of the Court over solicitors, be removed from the trust for acts done by him, not in the character of solicitor or in any relation immediately arising out of that character, but in the character of trustee, and that the order could not be sustained.¹

THIS was an appeal by Mr. Richard Blanchard, a solicitor, from an order made by Vice-Chancellor STUART upon the petition of Edmond Louis le Doulcet and Honorine Hedwige le Doulcet, presented in the matter of the said Richard Blanchard, a solicitor of this Court, and in the matter of the Trustee Act, 1850, and of the trusts of the mortgage deed of Edmond Louis le Doulcet, Elizabeth Adèle le Doulcet, now de Cantelon, and Honorine Hedwige le Doulcet, and whereby it was ordered as follows:—

“That Charles Francis Trower in the petition named be appointed a trustee of the said indenture dated the 28th July, 1848, in substitution for the said Richard Blanchard, the trustee in the said indenture named, without prejudice to any question as to the right of Edmond Louis le Doulcet and Honorine Hedwige le Doulcet to make the said Richard Blanchard personally answerable for any deficiency in respect of the principal sum of 300*l.* and
 * 132 interest secured * by the said indenture, and that the mes-
 suage and land comprised in the said indenture of the 28th July, 1848, do vest in the said Charles Francis Trower for all the estate and interest of the said Richard Blanchard therein as such trustee as aforesaid, to be held by the said Charles Francis Trower upon the trusts by the said indenture and by the notice dated the 18th November, 1855, declared and constituted, or such of them as are now subsisting or capable of taking effect, but subject to any equity of redemption therein, and subject to a charge of 3*l.* 6*s.* 8*d.*, with interest thereon, and to such other charge or lien (if any) as the same are now subject to, and that the right to sue for and recover the sum secured by the said indenture, and any interest in respect thereof, do also vest in the said Charles Francis Trower as such trustee. And that it be referred to the proper taxing master to tax the said Edmond Louis le Doulcet and Honorine Hedwige le Doulcet their costs of and relating to the said application. And it is ordered, that such costs, when taxed,

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1841.

be paid by the said Richard Blanchard to the said Edmond Louis le Doulcet and Honorine Hedwige le Doulcet."

The petition on which this order was made stated a case which it will not be necessary to go through in detail. Mr. Blanchard had been the solicitor of the petitioners and their sister. In 1843 the three Le Doulcets requested him to procure them an investment for 300*l.*, and the money was accordingly invested on the security of a mortgage by demise of leasehold property made to Mr. Blanchard as a trustee for them and containing a power of sale. In 1845 the mortgagor became bankrupt, and the interest from that time fell into arrears. The trustee took the benefit of the Insolvent Acts in 1850, and, as the petitioners alleged, concealed this fact from them, so that they did not discover it till December, 1859. * In 1855, the petitioners and their * 133 sister and her husband served on Mr. Blanchard a notice requiring him to exercise the power of sale, but he had never done so. The petition further alleged that Mr. Blanchard had from 1849 to 1852 been in the occupation of the property, that he had subsequently let it, and paid nothing to the *cestuis que trust*, that he had then allowed it to remain untenanted and get out of repair, and that a forfeiture for non-payment of ground rent had only been prevented by Mr. Trower's paying it on behalf of the *cestuis que trust*, that Mr. Blanchard had refused to sell when eligible offers were made by purchasers, and that he had repudiated the character of trustee and claimed full costs for business done by him as a solicitor. There were various other allegations of misconduct, but the above will sufficiently show the nature of the case made. Mr. Blanchard entered into evidence to disprove some of the imputations against him, offered explanations of the rest, claimed a balance to be due to him, and objected to being removed. The Vice-Chancellor, however, considered that a case had been made out for removing him, and that the Court had jurisdiction to do so upon the petition, and his Honor made the order under appeal.

Mr. Malins and *Mr. Speed*, for the appellant, contended, that the Trustee Act gave no jurisdiction to remove a trustee who desired to continue in the trust, and that a suit must be instituted for that purpose ; since a trustee had a right to have his accounts

taken, and an appointment of a new trustee under the Act would be no discharge to the old trustee. That the general authority of the Court over solicitors could not be exercised in respect of acts done by a solicitor not in that character or in any relation immediately connected with it, but only in the character of trustee.

They further urged, that even if the trustee could be removed * 134 moved * there was no jurisdiction to make him pay the costs. They referred to *Re Bridgman*, (a) *Re Woodburn's Trust*, (b) *Re Primrose*, (c) and sections 17, 36, 51, of the Trustee Act.

Mr. Haddan, in support of the order. — The petition is intitled in the matter of the solicitor, and the Court under its general jurisdiction over solicitors can remove the appellant for misconduct; when he is removed the trusteeship is vacant, and then the Trustee Act will clearly apply. Apart from this, the trustee's refusal to act brings his case within the earlier sections of the Trustee Act. It is a known practice to remove trustees under the Bankrupt Act; here the trustee has become insolvent, which is at least as good a ground for his summary removal. *Re Butterfield*, (d) *Re Barnes*. (e) The Court has jurisdiction to order the trustee to pay costs: *Manners v. Charlesworth*, (g) which was decided upon a clause very similar in its wording to the 51st section of the Trustee Act. In *Re Primrose*, the assignees were strangers to the trust. *Re Aitkin*, (h) shows that the Court may interfere in a case like this by virtue of its summary jurisdiction over solicitors.

Mr. Malins, in reply.

Judgment reserved.

March 21.

The Lord Justice TURNER, after stating the order appealed from, proceeded as follows : —

(a) 1 Drew. & Sm. 164.

(d) Seton Dec. 399, 403 (2d ed.).

(b) 1 De G. & J. 333.

(e) Seton Dec. 415.

(c) 23 Beav. 590, 599.

(g) 15 Apr. 1833, Jemmett's Sugden's Acts (2d ed.), p. 156, but see *contra*, *Re Third Burnt Tree Building Society*, 16 Sim. 296.

(h) 4 B. & Ald. 47.

The only material questions raised by this appeal are, * whether the Court had jurisdiction under the Trustee Act * 135 to make the order complained of, and whether the order could properly be made under the general jurisdiction exercised by this Court over its solicitors and officers. It is not necessary, in order to determine these questions, to enter into the details of the case. It is sufficient to state that the petition on which this order was founded states a mortgage for securing the sum of 300*l.* made to the appellant, who was at that time the solicitor of the petitioners, in trust for the petitioners and their sister, whose interest has since become vested in them; and that the petition alleges that the appellant has repudiated the trust, has refused to discharge the duties imposed upon him by it, and has otherwise misconducted himself in the discharge of those duties,—facts which are in dispute between the parties—the appellant excusing himself on various grounds from the imputations which are made against him, and claiming a balance to be due to him on account of the trust.

With respect to the jurisdiction under the Trustee Act, the case, I think, wholly depends on the thirty-second section of the Act, for although it was attempted in argument to bring the case within some of the earlier sections, which provide for the cases of trustees refusing to do certain acts, it is clear that the preliminaries required by those sections were not observed, and the case, therefore, cannot be brought within the enactments. It is to be observed, too, that these earlier sections do not extend to the appointment of new trustees, but merely provide the means of doing the acts which the trustee has refused to do. Looking then to the thirty-second section of the Act, was it intended to extend to displacing trustees who were desirous to continue in the trust, and appointing others in their place, and especially to displacing trustees and appointing others on the ground of * alleged misconduct in the * 136 trustees to be displaced, which is the case before us? I think not. The language of the section, although, no doubt, very general and extensive, does not seem to me to be adapted to such cases. It is, “whenever it shall be found expedient,” words which seem to me to import that the section was meant to apply to cases in which there might be a question of expediency, but there could scarcely by possibility be any case of a continuing trust (and it is to such trusts the section applies) in which it would not be expedient that a delinquent trustee should be removed and a new

trustee appointed in his place. Whatever doubt, however, there might be upon the very general words of this section, seems to me to be removed by the context of the Act. At the time when this Act passed, every trustee had the right to have his accounts taken in this Court in the presence of all the parties interested under the trust, so that all might be bound, and to have any balance which might be found due to him on the result of the account paid (or perhaps in some cases of urgency it might be secured to him), before he was denuded of the trust estate, and, except so far as recent legislation may have altered the case as to parties, I believe every trustee has still such rights. This Act does not profess to alter the rights of trustees in these respects, and I see nothing contained in it which in any way indicates any intention to do so; but if the construction of the thirty-second section which is contended for, be maintained, it will most undoubtedly do so, and to a very serious extent. How are these rights of displaced trustees to be preserved consistently with the thirty-fourth section, which gives power to the Court to vest the property in the new trustees; with the thirty-sixth section, which provides that neither the appointment of the new trustees nor the transfer of the property shall discharge the former trustees further than as they

* 137 would be discharged by the appointment of new * trustees under a power; and with the thirty-seventh section, which enables the appointment of the new trustees and the transfer of the property to be made upon the application of any of the persons beneficially interested, whether under any disability or not? for although it is, as I believe, usual, and certainly it has been our practice in lunacy, upon applications for the appointment of new trustees by persons having partial interests, to require the other persons interested to be served, the Act does not in terms so require, and it has not been unusual to dispense with service on all parties. Upon these grounds it appears to me, as I intimated in *Hodson's Case*, (a) that the thirty-second section of the Act gave no power to remove the appellant from the trust, and consequently that the order of the Vice-Chancellor, so far, if at all, as it proceeded upon that section, cannot be maintained.

Then as to the powers of the Court in respect of the general jurisdiction which it exercises over solicitors. I apprehend that

(a) 9 Hare, 118.

these are powers exercised by the Court only in respect of acts done by a solicitor in that character, or in some relation immediately arising out of it, as was the case in the Matter of Aitkin, not in cases where the solicitor stands in quite a distinct and different position, as in this case in the position of trustee, and where the acts complained of are, as in this case they are, incidental to, or consequent upon, his filling that position, and not the position of a solicitor; and I do not think that the fact of the appellant having become trustee in consequence of his having been the solicitor, could for this purpose alter the character of his acts; but even supposing that the Court could under any circumstances have exercised this jurisdiction by removing the appellant, I think that it could not be justified in * doing so without * 138 some account or inquiry. The case was ingeniously put by *Mr. Haddan* thus, that the Court had power to remove the appellant under the general jurisdiction, and then to fill up the trust under the statutory jurisdiction; but for the reasons already given I think this view of the case cannot be maintained. I am of opinion, therefore, that the order of the Vice-Chancellor must be discharged, without prejudice to any question, and that the proper order to be made is, that the original petition be dismissed without costs; the costs paid under the order to be refunded, and no costs of the appeal. I regret this result, as I fear that it may lead to further litigation, but I see no means by which the result can be avoided, unless the parties have the good sense either to adopt the order which I recommended at the hearing, or to refer all the questions between them to some gentleman who may judge more calmly than their own feelings will permit them to do. Of course it will be quite understood that I have not meant to give any opinion whatever upon the merits or demerits of any part of the case.

The Lord Justice KNIGHT BRUCE concurred.

* 139

* SMITH *v.* MATTHEWS.

In the Matter of MATTHEWS'S SETTLEMENT.

1860. July 12. August 3. 1861. March 6, 7, 22. Before the LORDS JUSTICES.

When the Court is called upon to establish or act upon a trust of lands, it must not only be manifested and proved by writing signed by the person by law enabled to declare the trust that there is a trust, but it must also be manifested and proved by writing signed as above what the trust is.¹

Where an equitable estate in fee descended on a married woman, the Court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate by curtesy of her husband could not be interfered with.²

A settlement of the personal estate of an intestate directed in favour of a married woman, who was his sole next of kin, though her husband, being his administrator, could obtain possession of it at law.³

THE principal question raised by this appeal was, whether a trust could be fixed upon certain lands called the Dorn lands for the benefit of the respondent Mrs. Matthews or of her and her children.

George Matthews, the husband of Mrs. Matthews, was formerly seised in fee of the Dorn lands, subject to an equitable mortgage by deposit of title-deeds to William Brooks, and, as it appeared, also subject to another equitable mortgage. He also formerly carried on the business of a grocer at Chipping Norton in a house of which he was owner in fee, subject to a legal mortgage in fee which he had made to the trustees of his marriage settlement for securing 1000*l.* He appeared to have been an improvident man, addicted to intemperance, and in the year 1852 his circumstances had become extremely embarrassed. Stephen Clark, the brother of Mrs. Matthews, who was one of the trustees of the marriage settlement, and was also one of Matthews's largest creditors, was applied to, and an arrangement was entered into between him and

¹ See *Lewin Trusts* (5th Eng. ed.), 46; *Steere v. Steere*, 5 John. Ch. 1; *Freeport v. Bartol*, 3 Greenl. 340; *Arms v. Ashley*, 4 Pick. 71; *Abeel v. Radcliff*, 13 John. 297; *Rutledge v. Smith*, 1 McCord Ch. 119; *Perry Trusts*, § 83.

² See *Lewin Trusts* (5th Eng. ed.), 535, 536, and note (b).

³ See *Lewin Trusts* (5th Eng. ed.) 535; 1 Dan. Ch. Pr. (4th Am. ed.) 90-92, and in notes; *Scott v. Spashett*, 3 Mac. & G. 599, note (2).

Matthews, which was carried into effect by two deeds of the 31st of July, 1852.

By the first of these deeds, after reciting to the effect * that George Matthews was seised in fee of the freehold * 140 hereditaments thereafter described and intended to be thereby conveyed, subject to an equitable charge thereupon to William Brooks for securing 750*l.* and interest and to the executors of Edward Brooks for securing 250*l.* and interest, and that George Matthews was possessed of and entitled to certain household goods and furniture, stock in trade, fixtures, book and other debts in his trade of a grocer, and also to certain horses, carts, and other things belonging to his said business, and that George Matthews was indebted to Stephen Clark in the sum of 1200*l.*, with an arrear of interest on his promissory note, and was indebted to other persons in the course of his trade in divers sums, which he was unable to discharge, and which with the before-mentioned debts amounted to 3980*l.*, and that Matthews, being desirous of giving up his business and of discharging his debts, had agreed with Clark to convey and assign to him all his said real and personal estate and effects, in discharge of the debt due to Clark and upon condition that Clark should take upon himself the above-mentioned debts, and that it had been agreed between the parties that 1200*l.* should be considered the purchase-money of the freeholds, Matthews conveyed the Dorn lands to Stephen Clark in fee, subject to the charges for 750*l.* and 250*l.*, and assigned to him absolutely his household goods and furniture, plate, linen, china, and implements of household and all his stock in trade and fixtures, and all horses, carts, and other things incident or belonging to the trade, and all book and other debts due to him, and the good-will of the trade, and all books and papers relating to it, with the usual power of attorney and covenants for title, and with a covenant by Matthews not to carry on business as a grocer within ten miles from the town-hall of Chipping Norton without Clark's consent. Clark by the same deed released Matthews from * the 1200*l.* and interest, and covenanted to pay the other * 141 debts, making up the residue of the 3980*l.* and to indemnify Matthews therefrom.

By the other deed Matthews demised the Chipping Norton house, subject to the 1000*l.* mortgage, to Stephen Clark for a term of

years at the rent of 60*l.*, determinable by Clark at the end of any year by giving six months' notice.

Upon the execution of these deeds Stephen Clark entered into possession of the Dorn lands and paid the debts which he had agreed to pay. He carried on the business for the benefit of Mrs. Matthews and her children and debited himself with the rents of the Dorn property in favour of Mrs. Matthews.

Soon after the date of the deeds Stephen Clark wrote a letter to Mr. Brooks, who was entitled to the 750*l.* charge on the Dorn lands, in which the following passage occurred: "With respect to my present arrangement, the business shall be carried on twelve months for the benefit of Mrs. A. Matthews and family, then in that period shall be able to learn respecting it. I have taken the whole responsibility upon myself, and hope and trust, with the assistance of Mrs. M. and a proper person, the business may command respect."

In April, 1853, Stephen Clark wrote a letter to Mr. Brooks relating to a policy on the life of Matthews, on which Mr. Brooks claimed to have a charge. In this letter the following passage occurred: "I trust you are aware that it is no personal advantage to myself for you to resign it into my hands, neither would I ask you were it not for the benefit of Mrs. M. and the family,
* 142 * but I consider it is my place to do all I can for their good, as there seems no other person to act for them."

In June, 1853, Stephen Clark wrote to an uncle of Matthews a letter complaining of the ill-behaviour of Matthews, which was in part as follows: "You cannot suppose I could have any other motive in taking to this business but for the good of his wife and family, thinking and hoping I might see him an altered character. That has now failed, and we have decided upon having a deed of separation drawn up between him and his wife."

In October, 1853, a separation took place between Matthews and his wife. On this occasion two deeds dated the 1st October, 1853, were executed. By the first of these, the separation deed, the policy of insurance which was held by William Brooks as a collateral security for his mortgage debt and a reversionary interest which George Matthews had in the 1000*l.* due to the trustees of his settlement, were assigned to Stephen Clark on trusts, which it is not necessary to state in detail, being trusts for Mrs. Matthews for life

for her separate use, then for her husband for his life, and then for the children. By the other of these deeds the equity of redemption in the Chipping Norton property was conveyed to a trustee in trust for Stephen Clark absolutely in fee.

On the 8th of December, 1853, Stephen Clark, having paid off the mortgage money due to William Brooks, received from him the title-deeds to the Dorn lands and signed and gave him the following memorandum:—

“MEMORANDUM.—The undersigned Stephen Clark having paid off the principal sum of 750*l.* and interest charged upon certain freehold property belonging to Mr. George Matthews at Dorn grounds in Worcestershire and * a life policy in the * 143 Provident Office, the several under-mentioned deeds and writings have been this day delivered by the said William Brooks to the said Stephen Clark as the trustee of the real and personal estate of the said George Matthews, the said Stephen Clark hereby undertaking to be responsible for the same and to indemnify the said William Brooks from all claims and demands whatsoever which may hereafter be made against him in respect of such deeds. Dated,” &c.

Stephen Clark died on the 18th of October, 1858, intestate, leaving Mrs. Matthews his heiress-at-law and sole next of kin, and thus the legal estate in the Dorn lands descended upon her. Stephen Clark was also at his decease entitled in fee to an estate called Primdown subject to a legal mortgage. Up to this time Mrs. Matthews had resided in the Chipping Norton house and managed the business under the advice and direction of Stephen Clark, and she continued to reside there. In May, 1859, letters of administration to Stephen Clark's estate were granted to Matthews. In the following month the suit of *Smith v. Matthews* was instituted by a creditor for the general administration of the estate, and in July, 1859, the usual decree was made.

In June, 1859, Mrs. Matthews and her children presented a petition to the Master of the Rolls in the Matter of the Trustee Act, 1850, and in the matter of her marriage settlement, praying for the appointment of new trustees of that settlement, which petition by leave of his Honor was amended, so as to pray also for

the appointment of new trustees of the deeds of 31st July, 1852, and 1st October, 1853. The plaintiff Smith shortly afterwards took out a summons in the suit asking that Mrs. Matthews might

deliver up to George Matthews possession of the Chipping
* 144 Norton house and the *grocery business, stock in trade, &c., and of the Dorn lands. This summons was adjourned into Court, and ultimately, on the 23d of January, 1860, an order was made in the matter and in the cause as follows:—

“His Honor being of opinion that the said grocery business, and the stock in trade, goods, and effects thereto belonging, are the sole and separate property of the said defendant Ann Matthews, and that the said lands at Dorn aforesaid and the said house and premises at Chipping Norton belong to the defendant Ann Matthews for her separate use for her life, with remainder to her children who were living at the date of the indenture of the 31st of July, 1852, this Court doth not think fit to make any order on the application of the said G. B. Smith.”

The order went on to direct that Samuel Phipps and James Phipps should be appointed trustees of the grocery business, stock in trade, &c., and of the marriage settlement and of the freehold premises comprised in the indentures of the 31st of July, 1852, and of the indenture of the 1st of October, 1853, and the usual vesting order was made.

The husband appealed against this order, the plaintiff not taking any part in the proceedings on the appeal, which did not affect the interests of the creditors, the estate of Stephen Clark being, in any view of the case, amply sufficient for the payment of his debts. The case came on before their Lordships on the 12th of July, 1860, and it being at that time understood that Stephen Clark's interest in all the real estate was only equitable, it was arranged that the case should be treated as if Mrs. Matthews had filed a bill to enforce her equity to a settlement, and their Lordships declined to decide the question, whether Stephen Clark had made himself a trustee of the property, until the question of the wife's equity to a settlement had been determined.

July 12. August 3.

* *Mr. Roundell Palmer* and *Mr. Eddis*, for *Mrs. Matthews*. — Under the circumstances of this case, the whole property ought to be settled. *Barrow v. Barrow*. (a) * 145

Mr. Selwyn and *Mr. Leonard Field*, for the husband. — The wife's equity to a settlement extends only to property which cannot be got at without the assistance of a Court of Equity, and, therefore, does not extend to any of the personal property in the present case, since the husband, as administrator, can obtain it at law. There has been a considerable provision made for the wife by her marriage settlement, and the Court will not settle upon her the whole of what it has jurisdiction to settle. *Re Erskine's Trust*. (b)

Their Lordships held that the whole property ought to be settled, and made an order accordingly.¹ Before it was drawn up, however, it was discovered that, as stated above, Stephen Clark had, at his death, the legal estate in the Dorn lands, and it therefore became necessary to decide whether *Mrs. Matthews* could establish a present right to them, independently of her husband, on the ground that Stephen Clark had made himself a trustee for her.

1861. March 6, 7.

Mr. Selwyn and *Mr. Leonard Field*, for the husband. — There is nothing whatever to fix a trust in the Dorn lands. There are vague indications of an intention on the part of Stephen Clark to deal with them for the benefit of *Mrs. Matthews* and her children, but there is nothing to bind him. The deeds are inconsistent with * the idea of a trust; trusts are declared of * 146 the policy, which shows that when the parties intended a trust they declared it. That Clark paid *Mrs. Matthews* the rents of the Dorn lands does not prove him to have been a trustee; he probably intended to apply all this property for the benefit of *Mrs. Matthews* and her children, and in part performance of this intention he voluntarily paid her the rent; but this could not bind him to carry out his intention any further.

Mr. Roundell Palmer and *Mr. Eddis*, for *Mrs. Matthews*. —

(a) 5 De G., M. & G. 782.

(b) 1 K. & J. 302.

¹ See *Scott v. Spashett*, 3 Mac. & G. 599, note (2), and cases cited.

The memorandum of 8th December, 1853, contains a distinct admission by Stephen Clark that he received the deeds of the Dorn property as trustee. Whether any trust attached on the Chipping Norton property it is needless to consider, for the equity to a settlement gives Mrs. Matthews all she needs as to that. As to the Dorn lands we have a clear admission of a trust, and evidence is admissible to show what the trust was. The Statute of Frauds does not require an admission in writing of the particulars of a trust. As regards an agreement, all its terms must be found in a signed writing; but as regards a declaration of trust the statute is satisfied when the legal owner admits in writing that he is only a trustee. There is, however, an admission by Stephen Clark of a trust for Mrs. Matthews and her family in the letter written by him soon after the execution of the deeds of July, 1852. The word "responsibility" would not have been used with reference to a business of which he was the beneficial owner; it implies liability for the benefit of another.

[THE LORD JUSTICE KNIGHT BRUCE. — Have you any authority for the position, that when you have a writing showing that there is a trust you may establish its terms by parol evidence?]

* 147 * *Dale v. Hamilton* (a) is in favour of that position. If the seventh section of the Statute of Frauds be compared with that relating to agreements the difference is striking. The statute is satisfied by holding that a man cannot be made a trustee unless there is an admission of trusteeship under his hand.

[THE LORD JUSTICE TURNER. — Do you not thus let in the mischief against which the statute was intended to guard?]

No; the danger to be guarded against is the defrauding a man by establishing him to be a mere trustee on parol evidence.

[THE LORD JUSTICE TURNER. — The statute was intended to guard against perjury as well as fraud. You let in the risk of perjury as between the *cestuis que trust*.]

To guard against that does not seem to have been so much the object. *Morton v. Tewart* (b) is very like the present case.

(a) 2 Phil. 266.

(b) 2 Y. & C., C. C. 67.

[THE LORD JUSTICE TURNER. — Might not that case proceed on the ground of fraud ?]

That ground does not appear from the judgment to have been the one mainly relied on. In the present case, however, we have evidence in writing ; the memorandum proves a trust of real and personal estate, and shows that Clark held the Dorn ground for the purposes of the trust. The deed and letters show what the trust was as to the personal estate. The trust was acted upon, and Mrs. Matthews had possession under it. If the case were one of agreement, there are acts of part performance which would take the case out of the statute. *Surcome v. Pinniger*. (a) But the doctrine of part performance is applicable to trust as well as to agreement, and the payment of rent is a sufficient part performance. Supposing there was a trust of real and personal estate referred to in a written document, evidence must be admissible to show that the trusts mentioned in certain other documents were the * trusts referred to, as, in the case of a plan re- * 148ferred to in an agreement, evidence is admissible to show which is the plan. *Forster v. Hale*. (b)

Mr. Selwyn, in reply. — To satisfy the seventh section of the statute there must be a writing showing what is comprised in the trust, and what the trust is. The letters do not help the respondent's case, for none of them refer in any manner to the Dorn lands. The memorandum, if it proves a trust at all, proves a trust for George Matthews. The object of the statute was to exclude parol evidence as to a trust of land. As to part performance, the principle of the rule of the Court on that subject is, that a person who has made a parol agreement, and then induced the other party to act upon it to his prejudice, shall not be allowed to set up the statute. The doctrine, therefore, cannot apply where the other party has not altered his position on the faith of the agreement. The costs applicable to the settled estate ought to be thrown on that estate, including the costs of the petition for appointing new trustees.

Judgment reserved.

(a) 3 De G., M. & G. 571.

(b) 3 Ves. 695.

March 22.

The Lord Justice TURNER, after concisely stating the facts, proceeded as follows :—

Mrs. Matthews, as heiress-at-law of Stephen Clark, having at his death taken the legal estate in fee in the Dorn lands, her husband George Matthews became entitled in her right to the rents, unless Stephen Clark had constituted himself trustee of the lands, * 149 in which case * Mrs. Matthews might be entitled to the rents, under the trust, if it was for her separate use, or, if it was not, by way of settlement or provision, in consequence of the estate being in trust; subject, in either view, to the question, what would be the effect of the legal estate having descended on her, a question which I mention only to lay it out of the case, it not being, as I think, necessary for us to give any opinion upon it. The case, I think, may well be disposed of upon the question whether Stephen Clark had constituted himself a trustee. The Master of the Rolls has thought that he had, and has declared accordingly, and this is the point which the appeal more immediately brings before us.

The circumstances of the case certainly lead to the inference that a trust for the separate use of Mrs. Matthews may have been intended, and they are such as would incline us to hold that the trust was created; but the case must be decided not upon inferences merely, or according to inclination, but according to the rules of law. A Court of justice cannot be too careful not to allow the rules of law to be frittered away either by suspicion or prejudice.

The law which governs the question, whether a trust for the benefit of Mrs. Matthews can be fixed upon the Dorn lands, is to be found in the seventh section of the Statute of Frauds (29 Car. 2, c. 3), by which it was enacted that all declarations or creations of trust or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect, and in determining the question we must look to what has been * 150 decided on the construction * of this section. Lord ALVANLEY, in dealing with the subject in *Forster v. Hale*, (a) has

(a) 3 Ves. 707.

thus expressed himself. The case before him was this: A gentleman named Burdon had a share in a colliery, and the suit was for the purpose of fixing a trust upon this share for the benefit of Burdon's partners in a bank in which he was also concerned. Lord ALVANLEY says this: "The circumstance that no notice was taken of any persons concerned with Burdon in that share of the colliery demised to him, nor any notice or intimation given in his life to the partners in the colliery by those of the bank, that they were, as to his share, partners with him, is certainly in favour of the defendants; but it is insisted, that though their names do not appear upon the lease, nor that they publicly, even by inquiry, ever busied themselves about the colliery, yet, in fact, an agreement took place, that he should be trustee as to his fourth for them and himself in equal shares; and they say, they can make it out satisfactorily to the Court, and within the Statute of Frauds, and that not by any formal declaration of trust, but by letters under his hand signed by him, in which, as they allege, he admitted himself such trustee; and that under the true meaning of the statute it is sufficient, if it appears in writing under the hand of a person having a right to declare himself a trustee; and that is equivalent to a formal declaration of trust. I am of that opinion certainly, as far as the question arises upon the statute. It was contended for the defendants, that there is great danger in taking a declaration of trust arising from letters loosely speaking of trusts, which might or might not be actually and definitely settled between the parties, with such expressions as "our," "your," &c., intimating some intention of a trust; that upon such grounds the Court may be called upon to execute the trust in a manner very different from that intended, and that it is * absolutely necessary, * 151 that it should be clear from the declaration what the nature of the trust is, or it cannot be executed. That I certainly admit. The question, therefore, is, whether sufficient appears to prove that Burdon did admit and acknowledge himself a trustee; and whether the terms and conditions, upon which he was a trustee, sufficiently appear. I do not admit with the defendants, that it is absolutely necessary that he should have been a trustee from the first. It is not required by the statute that a trust should be created by a writing; and the words of the statute are very particular in the clause (sect. 7), respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing;

but that they shall be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving there was such a trust. Therefore, unquestionably, it is not necessarily to be created by writing, but it must be evidenced by writing;¹ and then the statute is complied with; and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit it must be proved *in toto*, not only that there was a trust, but what it was."

The construction thus put upon this section of the statute has never, so far as I am aware, been disputed. The cases of *Dale v. Hamilton* and *Morton v. Tewart*, which were cited in the argument before us, are in no respect at variance with it. In each of those cases, the purpose and objects of the trusts appeared by the writings which were relied on, and so far from being disposed to dissent from what Lord ALVANLEY said, I entirely agree in it, and think that he has put a most reasonable, sound, and just construction upon the section. I take it, therefore, that when this Court is

called upon to establish or act upon a trust of lands by
 * 152 declaration * or creation, it must not only be manifested
 and proved by writing, signed by the party by law enabled to declare the trust, that there is a trust, but it must also be manifested and proved by writing, signed as required, what that trust is. The question we have to consider is, whether there is any such manifestation and proof. First the deeds were relied on, but none of the deeds seem to me to contain any indication of a trust of these lands. Reliance was then placed upon some letters of Stephen Clark's, but these letters refer to the business, and are equally silent as to any trust of these lands. The main reliance, however, was placed upon the memorandum, which was signed by Stephen Clark when he paid off Brooks's mortgage and got possession of the title-deeds of these lands, which memorandum was in these terms: [His Lordship here read the memorandum.]

It is this memorandum which seems to me to create the only serious difficulty in the case, but I think it by no means improba-

¹ See *Perry Trusts*, § 79 *et seq.*; *Pinnock v. Clough*, 17 Vt. 508; *Browne Statute of Frauds*, § 104; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Barrell v. Joy*, 16 Mass. 221; *Hutchinson v. Tindall*, 2 Green Ch. 357; *Lane v. Ewing*, 31 Missou. 75; *Jenkins v. Eldredge*, 3 Story, 294; *Lewin Trusts* (5th Eng. ed.), 45-47; *Steere v. Steere*, 5 John. Ch. 1; *Lerned v. Wannemacher*, 9 Allen, 416; *Sanborn v. Chamberlin*, 101 Mass. 416.

ble that in speaking of himself as a trustee in that memorandum Stephen Clark may have meant no more than that he considered himself to be a trustee with reference to the obligation which he had undertaken for the payment of George Matthew's debts, and at all events the memorandum does not show what was the trust to which it refers, and I think, therefore, that no trust in favour of Mrs. Matthews can be founded upon it. It was attempted to meet this difficulty by coupling the letters with the memorandum and treating the memorandum as declaring the same trusts of the lands as had been declared by the letters of the business, but the memorandum does not refer to the letters. There is no evidence to connect them, and even if they were connected I very much doubt whether we could consistently with the statute be justified in applying the trusts of the business to the lands in question.

* Upon the whole, therefore, my opinion is, that the case * 153 of Mrs. Matthews as to these lands cannot be supported. I am the better satisfied with this conclusion from the conflicting character of the parol evidence, from the circumstance that in some of the deeds express trusts are declared of parts of the property purchased by Stephen Clark, and from the difficulty there is in supposing that Stephen Clark could intend by such ambiguous and doubtful instruments either to provide for his sister or to deprive himself of the power of dealing with these lands, which would be the necessary consequence of the trust being fixed upon them. The doctrine of part performance was attempted to be brought in in support of Mrs. Matthews's case, but I do not think it can avail her. There is nothing in the nature of part performance except the voluntary payment of rent, and it would be going somewhat too far to say that Stephen Clark by voluntarily paying rent for the land could constitute himself trustee of the fee. The consequence of this decision must be, that the order of the Master of the Rolls must be discharged so far as it appoints a trustee of the Dorn lands. I think that the interest of the mortgage on Primdsdown should be kept down out of the settled estate.

THE LORD JUSTICE KNIGHT BRUCE. — Not without regret I have arrived at the same conclusion as the Lord Justice on the question of trust. We do not touch the husband's possible tenancy by the curtesy in the real estate of which we direct a settlement, and, so far as I am concerned, for this reason, that, in my opinion, we

have not jurisdiction to order any settlement which shall interfere with it.¹

- * 154 * All parties by their counsel consenting that their Lordships shall deal with this case in the same manner as if a bill had been filed by the said Ann Matthews to obtain a settlement upon her and her children of the real and personal estate of her late brother Stephen Clark, or of such part thereof as their Lordships shall think fit to direct; and it appearing that all the real estate of the intestate Stephen Clark other than the freehold lands at Dorn was equitable estate; and all parties by their counsel consenting that this Court should determine the questions of the equity of the defendant Ann Matthews to have the real and personal estate of the intestate Stephen Clark or part thereof (other than the said freehold lands and premises at Dorn) settled upon her and her children; and their Lordships not thinking fit to decide the question in the pleadings mentioned, whether any part of the real and personal estate (except the freehold lands and premises at Dorn) was held by the said intestate as a trustee for the separate use of the defendant Ann Matthews: Order, that so much of the order dated 23d January, 1861, as directs that S. Phipps and J. Phipps therein respectively named be appointed trustees of the freehold premises comprised in the said indenture of the 31st day of July, 1852 (being the said freehold lands and premises at Dorn), and as directs that the said lands should vest in such trustees, be discharged. Declare, that the said Stephen Clark was not at the time of his death a trustee of the said freehold lands and premises at Dorn. Declare, that the freehold house at Chipping Norton and the grocery business carried on there, and the freehold farm called Primdown, ought to be settled in trust for the defendant Ann Matthews during her life for her separate use, free from anticipation; and as to the said grocery business with remainder to her children; and as to the said
- * 155 house * at Chipping Norton and the said freehold farm at Primdown, during the life of the defendant Ann Matthews only (the said grocery business not to be converted into money, but to be retained *in specie*). Declare, that the interest on the mortgage debt secured on the said Primdown Farm is to be paid and kept down out of the settled estate of the defendant Ann

¹ See *Lewin Trusts* (5th Eng. ed.), 535, 536, note (b).

Matthews, and decree the same accordingly. And it is ordered, that all proper and necessary deeds and instruments for the purpose of carrying into effect the above declaration and decree be settled by the Judge (the costs of all parties of and incident to the preparation, approval, and execution thereof to be raised and paid out of the property to be comprised therein).

[The order then proceeded to give directions for winding-up the personal estate of Stephen Clark, the clear residue, if any, being ordered to be settled upon trust for Mrs. Matthews for life, with remainder to her children.]

* CHARLTON v. WEST.

* 156

1861. April 17. Before the LORDS JUSTICES.

Where a defendant is of unsound mind, not found so by inquisition, and the plaintiff applies for the appointment of a guardian *ad litem*, the practice is to appoint the solicitor to the suitors' fund; but if the application be made by the family of the defendant, this practice does not prevail, and any suitable person may be appointed.¹

THIS was a partition suit, in the course of which one of the defendants became of unsound mind, but was not found so by inquisition. His family agreed in the choice of a person to be his guardian *ad litem*, and applied to the Master of the Rolls, to whose Court the cause was attached, to appoint him. His Honor made the order, but the registrar considering that the practice was to appoint the solicitor to the suitors' fund in such cases, and not being satisfied that the attention of the Master of the Rolls had been fully called to point, declined to draw up the order without the matter being again mentioned to the Court. His Honor, upon its being mentioned, recommended the application being made to the Lords Justices.

Mr. Roundell Palmer and *Mr. J. N. Higgins* appeared in support of the application.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 177, 476.

THE LORD JUSTICE KNIGHT BRUCE. — When an application for the appointment of a guardian *ad litem* to a defendant of unsound mind, not found so by inquisition, is made by the plaintiff, it appears to be the usual practice to appoint the solicitor to the suitors' fund to be the guardian; but I am not aware that any such practice prevails where the application is by the family of the defendant. In the present case the family all concur in the application for the appointment of this gentleman to be guardian,
 * 157 and I am * of opinion, that an order for the appointment should be made upon production to the registrar of a satisfactory affidavit as to his fitness for the office.

The Lord Justice TURNER concurred.

NOTE: See *Thomas v. Thomas*, 7 Beav. 47; *M'Keverakin v. Cort*, 7 Beav. 347; *Moore v. Platel*, 7 Beav. 583; *Biddulph v. Lord Camoys*, 9 Beav. 548; *Brooks v. Jobling*, 2 Hare, 155; *Piddocke v. Smith*, 15 Jur. 1120.

In re HAIGH.

HAIGH *v.* HAIGH.

1861. March 8, 9, 12, 14, 15. April 30. Before the LORDS JUSTICES.

In proceedings under a reference to arbitration involving complicated accounts relating to a business, the arbitrator excluded the son of one of the parties who had been a clerk in the business, and whose assistance the father desired in the proceedings as to the accounts. He also excluded a short-hand writer whom the same party wished to employ to take notes of the proceedings. No reason justifying such exclusion being shown: *Held*, that the award ought to be set aside, and that the party did not, by attending the further proceedings under the reference, waive his right to take the objection.¹

At the last meeting under the reference, no notice having been given that it was to be the last meeting, the solicitor to the arbitrator stated that he should issue notices for another meeting. The award was signed on the next day.

¹ See *Davies v. Price*, 10 W. R. 865; *Morse Arb.* 173; *Strong v. Strong*, 9 Cush. 560, 568, *et seq.*; *Brown v. Bellows*, 4 Pick. 179; *Boston Water Power Co. v. Gray*, 6 Met. 131, 169; *Morse Arb.* 129, 130; *Christman v. Moran*, 9 Barr, 487.

Per the Lord Justice TURNER, the award was, under these circumstances, liable to be set aside.¹

THIS case came before the Court on motion to set aside two awards dated respectively the 1st of November, 1863, and the 12th of January, 1861, and made under an order in the above cause and matter dated the 23d of July, 1857.

The applicant George Armitage Haigh was one of the five sons of Joseph Haigh, who had died in 1851. Some of them had been in partnership with their father in working collieries, and the disputes which led to the reference arose in relation to various collieries and leases of collieries in which the parties were interested, partly in their own rights and partly under their father's * will, and in relation to extensive transactions in working * 158 these collieries, and to long and complicated accounts, both in respect of the partnership and between the parties individually. In 1856 an award was made by a Mr. Brook, under an agreement for reference; this award was in part confirmed by the Court, and in part set aside, and on appeal the order of reference of the 23d of July, 1857, was made. Under it Mr. Firth the arbitrator made three partial awards, dated the 9th of March, 1858, the 14th of July, 1858, and the 10th of July, 1860, which settled the rights of the parties, and were not objected to. It then remained only to settle the accounts. The arbitrator made an award of the 1st of November, 1860, relating to the partnership accounts, and one of the 12th of January, 1861, to the private accounts, and these were the two awards now sought to be set aside.

Various reasons were urged for setting them aside, several of which it does not appear material to notice. The fourth was, that Mr. Firth the arbitrator delegated his powers to Mr. Clay, an accountant employed to assist him in the accounts. The fifth was, the exclusion from a meeting before the arbitrator of Thomas Haigh, a son of Mr. G. A. Haigh, and the exclusion from several other meetings of Mr. Slade, a short-hand writer, whom Mr. G. A. Haigh wished to employ in taking notes for him of what passed before the arbitrator, and before the accountant Mr. Clay, who was employed to assist him. The son was upwards of twenty-four

¹ See *Page v. Ranstead*, 10 Allen, 295; *Walker v. Walker*, 28 Geo. 140; *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20; *Morse Arb.* 117, 118, 145; *Russell Arb.* (3d Eng. ed.) 165; *Fryer v. Shaw*, 27 L. J. Exch. 320; *Bedington v. Southall*, 4 Price, 232.

years old, had been a clerk in the business, and was well acquainted with the accounts, and the father desired his assistance in the matters of account, but having given offence to the arbitrator he was excluded from a meeting in July, 1860, subsequent to which several other meetings took place before the making of the first
 * 159 award * complained of, at none of which was he present, but his father employed another accountant. The Court considered that no case had been made out against him, such as could justify the exclusion of any person having a right to attend.

As regarded Mr. Slade, Mr. G. A. Haigh introduced him for the purpose of taking notes on the 12th of December, 1860. His attendance was objected to by one of the other parties, and he was accordingly excluded by the arbitrator from this and the subsequent meetings.

The sixth objection was, that the awards were made without sufficient intimation of the intention to make them, and that there was not only surprise on Mr. G. A. Haigh in their being made as they were, but that he was purposely and wilfully misled in that respect.

As regarded the fourth award, the case made was, that no notice was given either before or after the meeting of the 18th of October, that it was to be a final one as to the partnership accounts, and it was admitted by Mr. Clough, the solicitor to the arbitrator, in his cross-examination, before the Court, that G. A. Haigh, on bringing in a claim at this meeting, was told he was too late. Mr. Clough prepared the award, completed it by about three on the afternoon of the 1st of November, and it was signed by the arbitrator about midnight. As regarded the fifth award, there was no notice given that the proceedings would be closed on the 11th of January, which was the day of the last meeting, and Mr. Clough, in his cross-examination, stated that on that day he said he would issue fresh notices for a further meeting, and that he asked the parties whether they had any further private accounts, and that G.

A. Haigh did not say that he had any further accounts.

* 160 Mr. Clough said in explanation, * that the notices he had talked of sending out related to some executorship accounts, which it was at that time intended to include in the fifth award.

Mr. Bagshawe and Mr. W. H. G. Bagshawe, for the motion. — We contend that the fourth award was made precipitately without

due notice of an intention to make it, and the fifth award with an actual concealment of the intention to make it. It is plain from Clough's cross-examination, that G. A. Haigh had not on the 11th of January any notice that that was to be the last meeting, and that he was studiously kept in the dark on that subject. Nor was there any intimation that the meeting on the 18th of October, was to be the last before making the fourth award. There must be notice when it is intended to close any part of the case. There was an improper delegation of authority by the arbitrator to Mr. Clough and Mr. Clay. The precipitancy in getting the fourth award signed is enough to avoid it. Russell on Arbitration, (a) *Oswald v. Earl Grey*, (b) *Doddington v. Hudson*, (c) *Pepper v. Gorham*, (d) *Spettigue v. Carpenter*. (e) The exclusion of Slade and of Thomas Haigh was unjustifiable, and must have been prejudicial to the case of G. A. Haigh, and on this ground, if there were no other, the awards ought to be set aside.

Mr. Baily and *Mr. Pemberton*, for the parties supporting the awards. — It is not alleged that the arbitrator acted with partiality or unfairness, only irregularities are alleged, and the Court will not allow slight irregularities to defeat an award made by a gentleman who devoted much time to * the task, and had * 161 acquired an intimate acquaintance with the affairs from his three previous awards. No irregularity, except the exclusion of Thomas Haigh, is suggested to have occurred before September, 1860. Clay had not any authority delegated to him, he did not decide on any disputed items in the account, and he therefore acted within his province of reporting on the accounts. *Anderson v. Wallace*. (g) Clough neither examined any of the parties nor decided any thing, he therefore did not assume any of the arbitrator's authority. The arbitrator was entitled to take his opinion and act upon it if he thought fit. Russell on Arbitration, (h) *Emery v. Wase*, (i) *Hopcraft v. Hickman*. (k) The exclusion of Thomas Haigh was not complained of at the time. *Bignall v. Gale*. (l) And G. A. Haigh employed another accountant. As to the exclusion of Mr.

(a) Page 188 (2d ed.).

(b) 24 L. J. (Q. B.) 69.

(c) 1 Bing. 384.

(d) 4 J. B. Moore, 148.

(e) 3 P. Wms. 361.

(g) 3 Cl. & Fin. 26, 41.

(h) Page 205.

(i) 5 Ves. 846; 8 Ves. 504.

(k) 2 Sim. & Stu. 130.

(l) 2 Man. & G. 830.

Slade, we submit that it was fair and proper to exclude him. A short-hand writer may take down admissions made by other parties, but can make no admissions to bind his employer. No short-hand writer was employed on the other side, and if G. A. Haigh had been permitted to employ one, they would have been compelled to do the same, and thus incur an expense, to which we submit it was not reasonable that they should be put.

As to precipitancy, notice had been given in July, that a final award would be made before term, and before the 18th of October, the accounts were complete, except that it was necessary for a few items to be inquired into. As to the not disclosing the intention to make the fifth award, there was nothing to prevent the arbitrator from proceeding as he did. *Harvey v. Shelton.* (a)

* 162 * The parties did not say that they had any further accounts to bring in, and the expression of an intention to issue notices as to the executorship accounts could not mislead G. A. Haigh.

Mr. George Lake Russell, for the executors of the arbitrator, asked for his costs.

Mr. Bagshawe, in reply. — The argument of the other side, founded on *Bignall v. Gale*, is answered by *Re Plews and Middleton*, (b) and *Walker v. Frobisher.* (c)

Watson on Awards; (d) *Hewett v. Laycock* (e) and *Matson v. Trower*, (g) were also referred to.

April 30.

THE LORD JUSTICE KNIGHT BRUCE. — In this case various objections of more or less weight against the two last of the five awards made by the late Mr. Firth, under our order of the 23d of July, 1857, pronounced in the cause and matter now before us, have been suggested on behalf of one of the parties, namely, Mr. George Armitage Haigh, who seeks to have those two awards set aside. These objections have been in argument ably supported as well as ably opposed. The first three of these awards are now at least indisputable, and beyond saying, as I do, that in my judgment

(a) 7 Beav. 455, 460.

(b) 6 Q. B. 845.

(c) 6 Ves. 70.

(d) Page 97 (2d ed.).

(e) 2 C. & P. 574.

(g) Ryan & M. 17.

neither Mr. Firth, who died in February last, nor the accountant Mr. Clay, and the legal adviser, Mr. Clough, * or either * 163 of them, ought, on the evidence before us, to be viewed as having acted on any occasion with a bad intention or from an unfair motive, I deem it necessary to express an opinion upon one only of Mr. George Armitage Haigh's grounds of objection, I mean the exclusion from certain meetings under the reference of Mr. Slade and previously of the son of Mr. George Armitage Haigh, whose wish to have their presence and assistance before the arbitrator, or his accountant Mr. Clay, was by one or both of those gentlemen opposed and frustrated. This exclusion was, as to the son of Mr. George Armitage Haigh, at and from a time preceding the fourth award, subsequently to which time there took place meetings as well before that award as after it. Mr. Slade was a short-hand writer, whom Mr. George Armitage Haigh employed or desired to employ on one or more than one occasion to take notes for him of what should take place before the arbitrator, or before the accountant Mr. Clay, after the fourth award. The son is more than twenty-four years old, and must be taken to have been conversant with business and accounts. The father's wish to have the presence and assistance of these two individuals seems to me to have been lawful and reasonable. It does not appear that Mr. Slade the short-hand writer had misconducted himself in any way, or that the son had acted in such a manner as to warrant his exclusion. I cannot venture to pronounce that Mr. George Armitage Haigh's interests were not prejudiced by the exclusion of Mr. Slade; nor, as to the son, is it, I think, an unreasonable suggestion that his father's interests were so prejudiced. However the truth may have been, it seems to me impossible to assume that Mr. Broadbent, employed by him in the place of the son with respect to the accounts and books, was when first employed, or before the fourth award became, so well * versed in them as * 164 the son, or equally useful with respect to them.

I agree that circumstances may be imagined sufficient to justify the exclusion, but none such being in my opinion proved, it seems to me, that without entering into other objections, this is enough to entitle Mr. George Armitage Haigh to have each of the two awards in question set aside, whether they practically do substantial justice or not, a point on which I do not mean to intimate any impression. But I think that, unless so far as the arbitrator's

estate is concerned, there should be no costs of the motions or any motion before us, or of any of the proceedings before the arbitrator subsequent to his third award.

It was contended, I may observe, that Mr. George Armitage Haigh had barred himself by submission and acquiescence from any right to complain of either of the awards on the ground of the exclusion. That, however, is not my opinion ; it seems to me that he was not bound to recede from the reference or leave the remaining business to be transacted *ex parte*.

With regard to the costs here of Mr. Firth and his representatives, those costs should, as I conceive, be paid by Mr. George Armitage Haigh, by whom Mr. Firth was brought hither.

The Lord Justice TURNER, after shortly stating the outline of the case, proceeded as follows : —

There are various grounds on which it is sought, on the part of George Armitage Haigh, to set aside these two awards. They resolve themselves as it seems to me more or less into these points. First. That the state of health of Mr. Firth the
 * 165 arbitrator was such, at the times * when the awards were made, that he was unequal to the task of adequately discharging his duties as arbitrator. Secondly. That some books and documents relating or referring to the partnership and private accounts, although required by George Armitage Haigh to be produced, were not produced ; that there was no sufficient examination and investigation of the books and documents which were necessary to the due settlement of the accounts ; that some of the books which were produced before and acted upon by the arbitrator were not original books, but were in some parts compilations from invoices and other documents which were required to be and were not produced, and that alterations were permitted to be and were made in some of the books after they had been deposited with the arbitrator. Thirdly. That no account was taken of the capital brought by the several partners into the partnership concern. Fourthly. That Mr. Firth the arbitrator delegated his powers to Mr. Clay, an accountant employed to assist him in examining the accounts. Fifthly. That Mr. Firth, the arbitrator, improperly excluded from the meetings held under the reference, not only a son of George Armitage Haigh, who was well ac-

quainted with the accounts, and had been assisting his father with respect to them, but also a short-hand writer, who had been employed by George Armitage Haigh to take notes of the proceedings at some of the meetings, and lastly, that the awards were made without any sufficient intimation of the intention to make them, and that there was not only surprise upon George Armitage Haigh in their being made as they were made, but that he was purposely and wilfully misled in that respect. With reference, however, to this last objection it may be right to observe that great as is the hostility between the parties to this reference, no attempt was made at the bar to cast, and from what appears before us no attempt could properly be made to cast, any * imputa- * 166 tion upon the moral conduct of Mr. Firth, the arbitrator, who has died since the last of these awards was made. He appears to have given great care and attention to the business, and to have acted in it fairly and impartially notwithstanding great provocation on the part of Mr. George Armitage Haigh. The case put forward against these awards is not one of corruption or partiality on the part of the arbitrator, but of physical infirmity on his part and of errors and irregularities in the conduct of the reference, sufficient as it is said to induce this Court to set aside the awards. [His Lordship then stated his conclusion to be that the charge of incapacity wholly failed.] Then as to the other grounds on which the case of Mr. George Armitage Haigh is rested, it is to be observed in the first place that an arbitrator being a judge selected by the parties and chosen to decide without appeal, this Court has nothing to do with any mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be content to be bound;¹ but, on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this Court, when called upon to review their proceedings, is bound to see that those rules have been observed.² The difficulty which the Court has to encounter in deter-

¹ See *Tillam v. Copp*, 5 C. B. 211; *Mickles v. Thayer*, 14 Allen, 114, 120, 121; *Boston Water Power Co. v. Gray*, 6 Met. 131; *Withington v. Warren*, 10 Met. 431; *Russell Arb.* (3d Eng. ed.) 164.

² See *Morse Arb.* 115, 116.

mining questions of this nature is not as to the principles by which its decisions ought to be governed, but in determining whether what has been done falls within the range of the arbitrator's judgment, or contravenes the rules which ought to be observed in collecting the materials on which that judgment is to be exercised.

This, as it seems to me, is the question which we have * 167 principally to consider, with reference to the * remaining objections urged on the part of Mr. George Armitage Haigh to these awards.

As to the second and third objections, after having attentively read the evidence I am satisfied that they furnish no ground on which these awards, or either of them, can be set aside. I think that all the points raised under the second head of objection were within the range of the arbitrator's judgment, and that his judgment was exercised upon them, and cannot be disturbed, and I am satisfied that the point raised by the third objection is untenable. There is nothing either in the submission or in the order which rendered it incumbent upon the arbitrator to state upon the award the amounts of capital brought in by the several parties, and there is nothing to show that he did not take those amounts into the account. On the contrary, it is clear that he must have done so, as he has allowed interest upon capital.

The real question, as to the validity of these awards, depends, as I think, wholly upon the fourth, fifth, and sixth objections, and I regret to say that after having anxiously considered the points raised by those objections, I have come to the conclusion that they are fatal to both these awards. As to the fourth objection,—the delegation of authority.—By the terms of the submission the accountant to be employed was to examine and report to the arbitrator according to his directions upon the books, accounts, collieries, works, effects, and matters in question. I am satisfied, upon the evidence, that Mr. Clay, the accountant employed, was permitted to do, and in fact did, a great deal more than this. In the first place, it was on Mr. Clay's suggestion that the extension of time for the examination of the books and accounts, which was applied

for by Mr. George Armitage Haigh, was not granted, * 168 although the arbitrator was * willing to grant it. Why was

Mr. Clay permitted to interfere, and why did he interfere in this matter? It was plainly not within the range of his duty as an accountant as defined by the submission. Again, it appears by

the cross-examination of Mr. Clay that, in the absence of George Armitage Haigh, he received from the other parties explanations as to items in the accounts,— a course of proceeding which this Court cannot possibly sanction. It is true that he states in his affidavit that he did not allow these explanations to influence him in his report upon the accounts, and I have no doubt he honestly intended this to be the case ; but it is impossible to gauge the influence which such statements have upon the mind, and without meaning therefore to cast the least reflection upon Mr. Clay, I think this statement furnishes no justification for this course of proceeding. What, however, seems to me to be still more important, with reference to the proceedings of Mr. Clay, is this, that it appears by the evidence that it was by him the son of George Armitage Haigh was first excluded from attending upon the accounts, and I can find no explanation whatever of this assumption of authority on his part. It was plainly no part of his duty as accountant to determine who should be permitted to attend upon the reference. It may be said that the arbitrator afterwards sanctioned this determination, and indeed all the proceedings of Mr. Clay, but I am not prepared to hold that all Mr. Clay's proceedings were such as the arbitrator could be justified in sanctioning.¹

It is not however, as I think, necessary to decide this point, for I am of opinion, upon the fifth objection, that the arbitrator was not justified in excluding George Armitage Haigh's son from the meetings. I certainly do not mean to lay it down that an arbitrator is bound to submit to insults from those who attend him, but *I think that before he excludes any one from *169 attending on behalf of any of the parties interested he is bound to ascertain that there is good reason for the exclusion, and to take the best care he can that the party who is affected by the exclusion is not prejudiced by it. Here there was no examination as to the part which Mr. G. A. Haigh's son had taken with reference to the objectionable pamphlet which formed the ground of the exclusion, and it appears from the evidence, that had such an exami-

¹ See *Strong v. Strong*, 9 Cush. 560; *Knowlton v. Mickles*, 29 Barb. 465; *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20; *Proctor v. Williams*, 8 C. B. (N. S.) 386; *Anderson v. Wallace*, 3 Cl. & Fin. 26; *Winsor v. Griggs*, 5 Cush. 210; *Kerr F. & M.* (1st Am. ed.) 291, 292; *Pierce v. Perkins*, 2 Dev. Eq. 250; *Emery v. Owings*, 7 Gill, 488.

nation been had the exclusion could not have been justified. These remarks bear equally upon the exclusion of Mr. Slade the shorthand writer employed on behalf of G. A. Haigh, as to which it may also be observed, with reference to the fourth objection, that Mr. Clough, who was the mere legal adviser of the arbitrator, seems to have assumed authority to act beyond what, as it appears to me, could be justified. It was attempted to meet these fourth and fifth objections by insisting that they must be taken to have been waived by Mr. George Armitage Haigh, but the irregularities to which these objections apply were of such a description and calculated so seriously to prejudice Mr. G. A. Haigh, and it is so clear upon the evidence that what he afterwards did was done by him under the compulsion of the irregularities and without any intention to waive them, that with every disposition to support these awards I think it would be going too far to hold that he was bound by waiver. I doubt indeed whether, as to some of the points involved in these objections, they could in the absence of positive consent or the most clear proof of direct acquiescence be got over without the arbitrator retracing his steps.

What has been said upon the fourth and fifth objections is, I think, sufficient to dispose of the case, but it may be right to add that so far as respects the fifth award the sixth objection *170 would in my judgment, having regard to * the cross-examination of Mr. Clay, be also fatal, and that I am not satisfied that this objection ought not to be held good as to the fourth award also. Upon the whole, I think that the order must be to set aside both awards, but certainly without costs, except as to the arbitrator and his representatives, whose costs must be paid by George Armitage Haigh, by whom they have been made parties to these proceedings.

COCKBURN v. PEEL.

1861. May 8. June 12. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The Court will not, in the absence of special circumstances making the increase of the income of a tenant for life beneficial to those entitled in remainder, authorize the transfer of a fund from consols into another investment authorized by 23 & 24 Vict. c. 38, and producing a larger income, where such transfer is likely to cause a loss to those entitled in remainder.

Where therefore the tenant for life of a fund in Court petitioned to have it transferred from consols into East India stock, being a redeemable stock, the market price of which was at the time considerably above par, and no special circumstances were alleged to show that the consequent increase of the petitioner's income would be beneficial to her children, who were entitled in remainder: *Held*, that such change of investment ought not to be ordered.¹

THIS was a petition by way of appeal from a decision of Vice-Chancellor STUART, refusing to sanction a change of investment from consols into East India stock.

Robert Peel, the testator in the cause, by his will, directed a sum of 50,000*l.* to be invested by his trustees in or upon the public stocks or funds or other government securities, to be held by the trustees in trust for his grand-daughter Augusta Cockburn for life, for her separate and inalienable use, and after her death in trust for her children, who being sons should attain twenty-one or being daughters, should attain that age or marry. The trustees, in pursuance of the directions of the will, invested the sum of 50,000*l.* in bank 3*l.* per cent annuities, and at the time when the petition was presented there was * standing in the name of * 171 the accountant-general in trust in the cause "The trust account of the legacy of Augusta Cockburn," the sum of 55,000*l.* and upwards bank 3*l.* per cent annuities, the proceeds of the legacy. The legatee Augusta Cockburn had married Mr. Astley, and by an order in the cause the dividends of the bank annuities had been ordered to be paid to her for her separate use. There were

¹ The investment will, however, be changed, whenever the income arising from the fund in its present state of investment is not sufficient to answer its primary purpose. 2 Dan. Ch. Pr. (4th Am. ed.) 1791; *Mortimer v. Picton*, 10 Jur. N. S. 83; 12 W. R. 292, L. C.; *Fluid v. Fluid*, 7 L. T. N. S. 590, V. C. K.; *Lewin Trusts* (5th Eng. ed.), 253, 254.

two children of the marriage, the eldest of whom was only two years of age. Under these circumstances Mrs. Astley in March, 1861, presented a petition praying that the bank annuities might be sold and the proceeds invested in East India stock. The Vice-Chancellor Sir JOHN STUART, before whom, the petition originally came, did not think right to make the order, but by his permission it was mentioned to the Lords Justices, and by their direction it was brought before the full Court.

The market price of East India stock was at this time considerably above par, but an investment in it would still, owing to the high rate of interest which the stock bore, produce an income much larger than that obtainable by an investment in consols.

Mr. Bacon and *Mr. Dewsnap*, for the petitioner, referred to 23 & 24 Vict. c. 38, §§ 10, 11, 12; 22 & 23 Vict. c. 35, § 32; General Orders, February, 1861; *The Equitable Assurance Company v. Fuller*; (a) *Bishop v. Bishop*. (b)

They contended that the policy of the late Act was to encourage investments in safe securities yielding a higher rate of interest than consols. They also offered on behalf of the petitioner * 172 to set apart a yearly sum out of the * increased income to form a guarantee fund against possible loss to the capital.

Mr. Malins, for the trustees, submitted to act as the Court should think fit.

Judgment reserved.

June 12.

THE LORD CHANCELLOR. — When this case was before brought to our notice I entertained little doubt that the Vice-Chancellor was right in refusing the prayer of the petition, and I only wished it to stand over in the hope that we might be able to lay down some general rule as to such applications, which are now likely to be numerous. But I do not think that we can safely lay down any more precise rule than that, in the absence of any special circumstances which might make the desired transfer asked by the tenant for life beneficial to those in remainder, irrespective of pecuniary

(a) 1 J. & H. 380.

(b) 9 W. R. 549, V.C.K.

calculations, the transfer ought not to be permitted, if on pecuniary calculations it may be injurious to those in remainder.

In considering this case, when we look to the high interest on East India stock, into which the proposed transfer is to be made, compared to that on 3*l*. per cents, in which the money is now invested, and the probability of the one or the other being paid off, while there would no doubt be immediately a considerable increase of income to Mrs. Astley the petitioner, there is a risk, that if the East India stock were redeemed there would be a serious loss to her children on the reinvestment. An offer is made to guard against this peril by a sinking fund; but I do not think that this would be authorized by the statute under which the transfer is asked, and I do * not think that the transfer ought to be * 173 directed where such an expedient is necessary.

In this case the present income of the mother under the will is ample, and there is no suggestion of any advantage likely to arise to the children from the proposed change. I therefore think that the appeal should be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — I also am of opinion, that in the circumstances of this case the application now before us ought not to be complied with.

The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as the statement given above, proceeded as follows: —

There is no doubt that it is in the power of the Court to make the proposed order under the Statute 23 & 24 Vict. c. 38, and the General Order issued in pursuance of that statute, but it is not less clear that it is in the discretion of the Court whether the order should be made or not, and the Court when called upon to exercise its discretion must of course look to the interest of all the parties and not of some or one of them only. East India stock bears a high rate of interest, and is therefore more liable to be paid off than bank 3*l*. per cent annuities, and if it should be paid off during the life of Mrs. Astley a heavy loss might fall upon the children, as the stock is at present at a high premium. It is not therefore for the interest of the children that the proposed change of investment should be made. The petition states no circumstances

which could compensate the children for the danger of the
 * 174 loss to their fortunes, nor was any thing * urged at the bar
 in support of the application except the increase of Mrs.
 Astley's income. To grant the petition, therefore, would be to
 have regard to the interest of the tenant for life and to disregard
 that of the parties entitled in remainder, which in my opinion
 ought not to be done. There may no doubt be cases in which the
 exigencies of families or other circumstances may render it expedient
 for children that the income of their parent should be increased
 even at the peril of a loss to them, and I desire to be understood
 as not intending to prejudice such cases, but there do not appear
 to be any such circumstances in this case, and I think that where
 such circumstances do exist they should be stated on the petition.
 I desire also to be understood as not intending to embarrass trustees
 in the exercise of their discretion which the statute gives to them
 where the funds are not in Court. I think they will be fully entitled
 to the protection of the Court where they act *bond fide* in the exercise
 of that discretion. It was proposed on the part of the petitioner
 to meet the difficulty as to the interests of the parties entitled
 in remainder by creating a sinking fund, but if this could be done
 under the Act in any case, of which I am not satisfied, I think
 that it could not be done in this case, the interest of Mrs.
 Astley being inalienable. I agree, therefore, with the Vice-Chancellor,
 that no order ought to be made upon this petition.

* 175 * In the Matter of — WAY, a person of Unsound Mind.

1861. May 3. Before the LORDS JUSTICES.

There is no jurisdiction in lunacy to confirm a report made after the lunatic's death approving of an arrangement entered into by the committee in his lifetime. Whether, if the report had been made in the lunatic's lifetime, it could have been confirmed after his death, *quære*.

THIS was a petition by the committee of the estate of the lunatic who had lately died, and it prayed the confirmation of a report made by the Master in lunacy after the lunatic's death, approving of an agreement entered into between the committee and other parties in the lunatic's lifetime, relative to some deeds

executed by him and impeached on the ground of his insanity, and recommending its being carried into effect after his death as being beneficial to his estate. The agreement had been considered by the Master in the lunatic's lifetime and received his verbal approval, but the lunatic died before the report formally approving it had been prepared.

Mr. Bacon and *Mr. J. N. Higgins* appeared in support of the petition, and contended that the Court had jurisdiction notwithstanding the death of the lunatic. *Re Fitzgerald*, (a) *Re Roberts*, (b) *Ex parte Armstrong*, (c) *Ex parte Grimstone*, (d) *Re Patrick*, (e) *Re the Earl of Kingston*, (g) *Ex parte M'Dougal*, (h) *Shelford on Lunacy*. (i)

Mr. Selwyn, *Mr. Freeman*, and *Mr. S. G. Langley* appeared for the heir-at-law, next of kin, and other parties, and did not oppose the petition.

*THE LORD JUSTICE KNIGHT BRUCE. — Whether if the * 176 Master's report had been made in the lifetime of the lunatic we could after the death of the lunatic have confirmed it or done any thing in the matter, is a point upon which it is unnecessary to give, and upon which I do not give, any opinion. The report now before us was not made before the death of the lunatic, and in these circumstances I think that we have no jurisdiction to confirm it or act upon it. It appears to me, to say the least, very doubtful whether the Master had any authority to make any report of this nature after the death, but I entertain no doubt of the absence of any jurisdiction in us to confirm it.

The Lord Justice TURNER concurred.

(a) 2 Sch. & Lef. 432, 441.

(b) 3 Atk. 308.

(c) 3 Bro. C. C. 237.

(d) Ambl. 706.

(e) 2 Phil. 394.

(g) 2 Ir. Eq. Rep. 169.

(h) 12 Ves. 384.

(i) Page 23 (2d ed.).

* 177 * MARRIOTT v. The ANCHOR REVERSIONARY COMPANY.

1861. March 16, 20. May 8. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The mortgagees of a ship took possession, and forthwith commenced employing her in a hazardous and speculative business. During the course of this employment, which was throughout a losing one, they put her up for sale under depreciating conditions, and no sale having been effected, continued to run her some weeks longer in a reckless manner till she was much depreciated in value, and then sold her for a small sum.¹ Vice-Chancellor STUART made a decree charging the mortgagees in account with the value of the ship and fittings at the time when they took possession of her, and placing matters on the same footing as if they had bought her at that time.² *Held*, by the Lord Chancellor and Lord Justice KNIGHT BRUCE, that this decree was correct; *dissentiente* the Lord Justice TURNER, who was of opinion that the proper form of decree would have been to charge the mortgagees with what the ship might have earned if chartered in the ordinary course, and with all damage beyond ordinary wear and tear occasioned by their employment of her.

The question as to the right of a mortgagee of a ship to employ her considered.

THIS was an appeal by the defendants from part of a decree of Vice-Chancellor STUART charging the defendants, the mortgagees of a ship, with the value of her at the time they took possession.

The plaintiff, W. A. Marriott, on the 24th of July, 1858, mortgaged the steamship Orwell to the defendants, the Anchor Reversionary Company, for 1000*l*. The mortgage was in the usual form according to the requisitions of the Merchant Shipping Act of 1854, and there was a contemporaneous instrument providing for payment by instalments. The plaintiff, it appeared, expended the borrowed money in repairs and improvements of the vessel; he then employed her in conveying goods and passengers between London and Ipswich till July, 1859. At that time there being a competition from a railroad and steam-packet company which rendered this employment unprofitable, the plaintiff withdrew the vessel from the station, cleaned her, painted her, and prepared her for sale. In the mean time 750*l*. out of the 1000*l*. being still due, and the plaintiff having made default in payment of the instalments,

¹ See 1 Dart V. & P. (4th Eng. ed.) 65.

² See Abbott Ship. (11th Eng. ed.) 33, 34, and cases in note (u).

the defendants * brought an action, and on the 28th of * 178 May, 1859, judgment was entered up by consent. On the 20th of July, 1859, the plaintiff being still in default, the defendants took possession of the ship as mortgagees, and immediately commenced running her again daily between London and Ipswich. They alleged that the plaintiff had entered into engagements which made it necessary for the ship to continue running, but the Court considered that there clearly was nothing binding the mortgagees or owners to run her between London and Ipswich. The plaintiff protested against the vessel being continued in this losing trade, but the defendants paid no attention to his remonstrances and continued running her. On the 3d of August the defendants put up the ship for sale, the particulars stating that she had two boilers, one new in July, 1858; the fact being that she had only one large boiler, which was new in July, 1858. The plaintiff appeared and objected, and the sale was not proceeded with; but on the 12th of August the ship was again put up for sale under conditions, the 4th of which was in part as follows, "On the completion of the purchase the purchaser will become entitled to the engagement that has been entered into with the captain, engineer, and crew of the vessel, to carry passengers between London Bridge Wharf and Walton-on-the-Maze up to the 3d of October. The purchaser shall enter into an undertaking with the vendors to fulfil the engagements and to discharge the obligations created by the issue of return tickets."

There was no bidder at the sale, and the company continued to run the vessel between London and Ipswich at a considerable loss till the end of September. On the 3d of October, they sold her by private contract for 750*l.*; she being alleged by the plaintiff to have been worth at the time of the mortgage 800*l.* if sold to be * broken up, and 2500*l.* as a going vessel. It appeared * 179 from the evidence that during the running by the company she was injured by running races with other ships and was otherwise improperly managed so as to become very much deteriorated. On the 24th of November, 1859, the defendants delivered to the plaintiff an account in which they credited him with the 750*l.* received from the sale of the vessel, and debited him with the losses they had incurred in running her. They thus made out to be due to them a balance of 454*l.*, which, if the loss on running her were disallowed, would be reduced to 163*l.*

The Vice-Chancellor made a decree declaring that, having regard to the way in which the defendants dealt with the ship, stores, and effects after they took possession on the 20th of July, 1859, they ought in taking the account thereafter directed to be charged with the value of the ship, fittings, stores, and effects at the time when they took possession thereof; and an inquiry was directed what was the fair value thereof when such possession was taken. The decree proceeded to direct an account of what was due to the defendants for principal, interest, and costs properly incurred before the 20th of July, 1859, on the security of the vessel, with a direction to charge them with what should be ascertained to be the value of the ship and fittings, stores and effects, and the defendants were ordered to pay the plaintiff's costs up to and including the hearing. (a)

Mr. Shapter, Mr. Giffard, and Mr. Dickenson, for the defendants, in support of the appeal. — We contend that a mortgagee of a ship has a right to take possession of and use her. The rights of mortgagees of ships under the old law are governed by 3 & 4 Will. 4, c. 55, § 42. In *Irving v. Richardson* (b) it was questioned whether the mortgagee of a ship had any right to insure her; but in *Kerswill v. Bishop* (c) it was held that on taking possession a mortgagee has the rights of an owner. He has a right to take possession of and use the ship: *Langton v. Horton*; (d) *Feltham v. Clark*; (e) *Garomer v. Cazenove*; (g) all which were cases under the old Act. Under the present law the rights are governed by 17 & 18 Vict. c. 104, §§ 66, 70, 71, which do not restrict the rights of mortgagees. *European and Australian Royal Mail Company v. Royal Mail Steam-Packet Company*, (h) *De Mattos v. Gibson*. (i) A mortgage is a different thing from a pledge, and the rights of a mortgagee are more extensive in some respects than those of a pledgee. *Jones v. Smith*. (k) The principles on which a mortgagee is dealt with are shown in *Williams v. Price* (l) and *Wheatley v. Bastow*. (m) The ship was bound by

(a) 2 Gif. 457.

(e) 1 De G. & Sm. 307.

(b) 2 B. & Ad. 196.

(g) 1 H. & N. 423.

(c) 2 Cro. & Jer. 529.

(h) 4 K. & J. 676.

(d) 5 Beav. 9; 1 Hare, 549.

(i) 1 J. & H. 79, 84, 85; 4 De G. & J. 276.

(k) 2 Ves., Jr. 372, 378.

(m) 7 De G., M. & G. 261.

(l) 1 Sim. & Stu. 581.

her previous engagements to run for the season, and we ran only for that season. A mortgagee is to be charged only for plain, obvious gross negligence. *Hughes v. Williams*. (a) Here we submit that there was no such negligence; we were not bound to keep the ship in dock bringing in nothing, and we ought not to be charged with the depreciation occasioned by using her.

* *Mr. Malins* and *Mr. De Longueville Giffard*, in support * 181 of the decree. — If the mortgagees had used reasonable diligence they could have sold the vessel before the commencement of the running which caused the injuries of which we complain, and the proceeds would have left a surplus for the mortgagor. They put her up for sale while running daily, so that she could not be properly inspected by an intending purchaser, and, what was still worse, burdened with a contract of a very disadvantageous description. A sale at a fair price was consequently not to be expected. The defendants then ran the ship recklessly, evidently with a view to driving the rival company off the line. It might answer for a company to do this, but it is a course manifestly destructive to the owner of a single vessel. The result was that after the ship had been sold, the plaintiff, who had only received from the mortgagees 1000*l.*, had lost the ship on which he had expended the money borrowed and was left 454*l.* in debt. It is an old and familiar doctrine of the Court that a mortgagee in possession is not at liberty to improve the mortgagor out of his property; can he then be at liberty to trade him out of his property by embarking it in a business known to be a losing one. The mortgagee cannot have an unlimited right of trading with the mortgaged chattel. *Hughes v. Williams*. (a) *Irving v. Richardson*, *Langton v. Horton*, and *Feltham v. Clark* have no application. The only decision cited which bears against us is the *European and Australian Royal Mail Company v. Royal Mail Steam-Packet Company*, and the circumstances there were so special as to make that case no measure for this. In that case and in *De Mattos v. Gibson* (b) there are indeed *dicta* of Vice-Chancellor * Wood in favour of a * 182 general right of trading with a ship. We do not admit their soundness, but, allowing a general right of trading, it must be prudent trading, or else the mortgagee must bear the loss, and here

(a) 12 Ves. 493.

(b) 1 J. & H. 84.

it was most reckless to resume running on a line which the mortgagor had just abandoned as unprofitable. The Merchant Shipping Act was never intended to give a mortgagee a general right of trading with a ship. Sect. 71 plainly shows that the statute gives no such right, and a mortgagee who wants more than the statutory powers should have his mortgage deed drawn so as to give them. The engagements of the mortgagor did not bind the ship, and the defendants would not have been obliged to give effect to them even if they had contracted for a continuance of the *Ipswich* trade, (which on their true construction they did not), the contract being merely personal. (a)

[THE LORD CHANCELLOR. — Is it not new to charge a mortgagee with the original value of the ship, as has been done here?]

If we are right in our contention that the trading was improper we shall get at the same result substantially, whatsoever form be adopted; the mortgagee must be made responsible for the consequences of his unauthorized or improper acts. He by spoiling the ship made it impossible for us to redeem the thing which we had mortgaged to him, and we contend that the form adopted is right, viz., to charge him with the value. The depreciation of the ship is not in the nature of wilful neglect or default, it is a misfeasance, the proper remedy for which is to charge the wrong-doer with the original value of what he has destroyed. *Coggs v. Bernard*, (b) *Lupton v. White*. (c) Another possible course is to charge the mortgagee with occupation rent. *Trulock v. Robey*. (d)

* 183 * *Mr. Shapter*, in reply. — The fallacy of the respondent's argument is this, that it treats this as a pledge, not as a mortgage. The two things are very different. *Jones v. Smith*, (e) and the remarks of Lord HOLT, cited in the case of the *Australian Mail Company*, (g) are explained by the Vice-Chancellor's observations on this difference. *Wheatly v. Bastow* (h) assumes that there must be wilful default in order to charge a mortgagee.

(a) Merchant Shipping Act, §§ 167, 188, 189.

(b) Ld. Raym. 909, 916.

(c) 15 Ves. 432, 439.

(d) 15 Sim. 265.

(e) 2 Ves. Jr. 372.

(g) 4 K. & J. 680.

(h) 7 De G., M. & G. 261.

The same principle is asserted in *Stokoe v. Robson*, (a) as to loss of title-deeds, and in *Matthie v. Edwards*. (b) Here we used the ship for a moderate time while trying to sell; it was our only way of making her produce any thing in the interim. Suppose the statute had not given a power of sale, could it have been contended that a mortgagee must retain the ship and do nothing with it?

Judgment reserved.

May 8.

THE LORD CHANCELLOR. — This case depends upon conclusions of fact, to be drawn from conflicting evidence. After a careful examination of that evidence, the following facts, I think, are established: that on the 24th of July, 1858, the plaintiff mortgaged the steamer *Orwell* to the defendants for 1000*l.* advanced by them to him; that the vessel was then employed in carrying passengers and goods daily between London and Ipswich; that, the 1000*l.* being laid out in repairing her, she was continued by the plaintiff in this traffic till the beginning of July, 1859; that from the rivalry of a steamboat company and a railroad, * the plaintiff lost a considerable sum of money by so em- * 184 ploying the vessel in this trade; that he prudently withdrew her from the station, put her into a dock, cleaned her, painted her, and prepared her for sale; that the vessel might then have been sold to advantage for a much larger sum than she afterwards produced; that 750*l.* of the 1000*l.* advanced being still due, for which the defendants had brought an action and had obtained a judgment, they on the 20th of July, 1859, took possession of the vessel as mortgagees, with a view of again employing her in the same trade; that they were told it would be imprudent to do so; that they nevertheless took her from the dock in which she lay, and imprudently employed her in the same trade between London and Ipswich: that she was afterwards improperly managed and was injured in running races with other ships between London and Ipswich; that there was no engagement with the captain and seamen who navigated her which required her to continue in this trade; that the defendants imprudently continued her in this trade till the end of September, so that considerable sums of money were

(a) 3 Ves. & Bea. 51.

(b) 11 Jur. 504.

lost in such employment; and that in the beginning of October they sold her for a very small sum of money; that they gave credit to the plaintiff for this sum as her value, and that they sought to charge him with all the sums laid out upon her, and the loss sustained by so employing her between July and October.

The counsel for the appellants contended that they had, under 17 & 18 Vict. c. 104, § 70, an unlimited right to employ the ship as they thought fit, so that they were not guilty of "wilful default," until they were reimbursed the full amount of the mortgage money, with interest and expenses; but the counsel for the respondent insisted that the mortgagee of a ship who takes possession has no right to use her at all, except with a view
 * 185 * to sell her forthwith, and is bound to sell as speedily as this act can with prudence be done.

I cannot concur in the unlimited right of the mortgagee to use the ship as the owner might do, notwithstanding the *dicta* of Vice-Chancellor PAGE WOOD in *European Company v. Royal Mail Company*, (a) which have produced this marginal note—"A mortgagee of a ship has power under the 70th section of the Merchant Shipping Act, 1854, to use as well as sell the ship, *semble*." I doubt whether the enactments in the statutes referred to as to the rights and liabilities of the mortgagee of a ship, which regulate the relation between the mortgagee and third persons, and protect him both from claims founded on contract and on tort till he has taken possession, are intended to vary or regulate the power of the mortgagee as between him and the mortgagor. At any rate they cannot be intended to empower the mortgagee, at the expense and risk of the mortgagor, to send the ship to any quarter of the globe, and to employ her in any trade for which she may be adapted, for any indefinite length of time. Is the burden of repairs and of paying the master and seamen and of all the ship's disbursements to be borne by the mortgagor? Is he to be charged for insurance? and, if the ship is wrecked uninsured, is the loss to fall upon him, he being still liable for the balance of the unpaid mortgage money?

Nor can I lay down the strict rule that the mortgagee can never lawfully employ the ship to earn freight, or that after taking possession he must allow her to lie idle till he may prudently sell her.

(a) 4 K. & J. 676.

He may take possession when she is prosecuting a voyage under a charter-party, and, at the end of the voyage, it is easy to conceive circumstances which would justify him in a * temporary employment of the ship while waiting for a favourable opportunity to sell her. What is said by Lord HOLT in *Coggs v. Bernard* against the use of any chattel bailed by way of security, which might be injured during the use made of it, cannot apply to the mortgage of a ship.

But although there may be a great difficulty in defining the exact limits of the power of the mortgagee to use the ship, this I think may be laid down with perfect safety and confidence, that if the mortgagee does take possession, he can only lawfully use the ship as a prudent man would use her, she being his own property. Now it seems to me that in this case the defendants used the ship very imprudently and unjustifiably, and that they cannot throw upon the plaintiff the loss sustained by this user and make him suffer from the deterioration in value of the ship between the time of taking possession and the sale. But instead of taking the account on the footing of "wilful neglect," including all disbursements and receipts, and having regard to the deterioration of the ship while in possession of the mortgagees, I think the Vice-Chancellor has done well by granting the first prayer of the bill, and declaring "that, having regard to the way in which the defendants dealt with the mortgaged ship, and with the stores and effects of the said ship after they took possession thereof on the 20th of July, 1859, the said defendants in taking the accounts directed between them and the plaintiff are to be charged with the value of the said ship and the said stores and effects at the time when they so took possession thereof." This seems to me to be a simple mode of effectually doing justice between the parties. If the ship and her stores ought then to have been sold, I think the plaintiff ought to be credited with the sum they then would have fetched; and the defendants, acting as reckless owners, * can- * 187 not complain if they are treated as purchasers at a fair market value.

It is only against this part of the decree that the appeal is brought; and I am of opinion the appeal should be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — The circumstances of this case, which as before the Vice-Chancellor STUART is reported in

the Jurist of the 23d of February last, are special and peculiar. It is agreed between the parties that of the ship in question, the Orwell, which had been mortgaged by the plaintiff to the defendants previously to July, 1859, the defendants on the 20th of that month took possession, and that from that day until the defendants sold the vessel, as they in a later part of that year did, they continued in possession of her. And the main point for decision is, whether between the 20th of July, 1859, and that subsequent sale, the defendants so acted with respect to the vessel as to become chargeable in account between them and the plaintiff at his option as upon and from the 20th of July, 1859, with her value in money on that day, as if they had on that day become purchasers of her at a price of that amount, — a charge which, if the defendants are liable to it, must of course take away from the plaintiff all concern in or with the vessel as from the 20th of July, 1859. I agree with the conclusion of the Vice-Chancellor STUART, that the defendants, by means of their conduct and proceedings, became thus chargeable, were so when the bill in this cause was filed, and are so now. Their dealings with the vessel between the time of taking possession and their sale of her were in my opinion not justifiable nor excusable, nor are perhaps explicable on any other

* 188 hypothesis than that they meant * to make themselves absolute proprietors of her, and so considered themselves during the whole of that interval, not by means of foreclosure or any analogous proceeding, for there was none such, but by means of what was tantamount to an appropriation of the property to themselves exclusively and absolutely by their own arbitrary authority. This appropriation might, I assume, have been disputed by the plaintiff, who might, I also assume, have insisted on redeeming the vessel before the defendants sold it, but their proceedings entitled him, I think, to elect and he has elected to treat them as purchasers of it at the fair value, as that value was at the time when they took possession. They engaged the vessel in an adventure in which, as mortgagees, they had no right to engage her at the plaintiff's risk, and put her up for sale by auction, though ineffectually, yet under conditions that the character of mortgagees could not justify, before which however, and therefore before the sale, they had effectually crippled the original right of redemption. I think that their claim against the plaintiff is unjust; that they have treated him oppressively; and that they have been rightly ordered to pay

him his costs of the suit down to the original hearing; for though some parts of the affidavits made against the defendants have probably or certainly gone too far, there is not, as I conceive, enough in that respect to charge the plaintiff, entitled clearly as he was, in my opinion, to the general costs.

I suppose that nothing has yet been done in Chambers. The petition of rehearing or appeal should, I need hardly repeat, be in my opinion dismissed.

THE LORD JUSTICE TURNER. — The principal question which was raised in the argument * of this case was as to * 189 the right of a mortgagee of a ship who has taken possession to use and employ the ship, and to be allowed in the mortgage account any loss which may arise in consequence of such use and employment, accounting of course for any profit which may be derived from it. It is not perhaps necessary for us, under the circumstances of this case, to give any opinion upon this question, considered as a general question affecting all cases of mortgagees of ships. Assuming that the question of right ought to be decided in favour of the mortgagee, I think that he would be bound to exercise the right with care and caution; and I am of opinion, that the defendants in this case have dealt with the vessel, of which they took possession as mortgagees, so improvidently and imprudently as to disentitle them to the benefit of the right.

The vessel at the time when she was mortgaged to the defendants and until very shortly before the defendants took possession of her, was employed in the trade of carrying passengers and goods between London and Ipswich, in competition with other vessels engaged in the same trade between the same ports, but before the defendants took possession she had been withdrawn from the line. The defendants, however, when they took possession, again employed her in the same trade, and embarked her in the same competition, and they continued to do so until she was sold. This use and employment of the vessel was not in the ordinary course. It was, as it seems to me, very little if at all short of embarking her in a trading speculation, for the evidence shows that the profits of vessels which are thus employed are, to a considerable extent at least, derived from the sales of provisions on board the vessels. The defendants are the less excusable for having thus employed the vessel, as it appears that before they

* 190 took possession the * trade had been a losing one; but it was said for the defendants that they were not informed of this, or of the vessel having been taken off the line. I think, however, they were bound, before embarking the vessel in such a speculation, to have inquired into these matters much more carefully than they appear to have done. It was also attempted on the part of the defendants to justify their course of proceeding, upon the ground of obligation to the master and sailors created by the ship's articles; but I think there is no foundation for this argument, either upon the construction of the articles, or upon the facts of the case. My opinion therefore is, that, under the circumstances of this case, the defendants are not entitled to be allowed the loss arising from their employment of the vessel.

I desire, however, not to be understood as intimating any opinion unfavourable to the right of a mortgagee of a ship to employ her in the due and ordinary course. With respect to this question, I do not understand the Lord Chancellor or my learned brother to be of opinion, nor do I collect from the note of the Vice-Chancellor's judgment that he was of opinion, that a mortgagee of a ship taking possession could at no time and under no circumstances be entitled to use and employ the ship otherwise than at his own peril, and certainly I am not of that opinion. I think that the first duty of the mortgagee is to sell the ship; but I do not think that he is bound to sell at every sacrifice. He may be chargeable if he makes an imprudent and reckless sale; and he ought not, I think, to be charged if in the prudent exercise of a fair discretion he abstains from proceeding to a sale. In the exercise of this discretion I think that he is entitled on the one hand to have regard to his own interest, and bound on the other hand to respect the interest of his mortgagor. It is to be remembered, that the

* 191 * equity of redemption is the creature of a Court of Equity — that the mortgagee has, at law, the absolute title; and that the object of a Court of Equity must be to do what is just and fair between the parties, having regard to the rights and interests of both of them; and it is to be remembered also, that the mortgagor may at any time relieve himself by paying the amount which is justly due upon the mortgage. These considerations lead up to the question, what is to be done in cases in which a sale cannot reasonably and prudently be effected. Is the mortgagee in such a case bound to keep the ship unemployed, except at his own risk, or

is he justified in employing her at the risk of the mortgagor. This is a question of great importance, as affecting property of this description. It cannot be doubted that, if it be held that the mortgagee is not entitled to employ the ship at the risk of the mortgagor, there will not only be great difficulty in raising money upon such mortgages, but great danger of the property being sacrificed, by mortgages being driven to hasty and improvident sales; and on the other hand, if the right to employ the ship be conceded to the mortgagee, there is no doubt danger of the mortgagor being involved by the mortgagee in speculative adventures. The public policy of the country is not, I think, without its bearing upon the question. It is certainly in favour of the employment of shipping, and if the mortgagee has not the right to employ the ship at the mortgagor's risk, there would evidently be great danger of mortgaged ships remaining idle and unemployed. The Merchant Shipping Act does not seem to me to decide the question; but I do not think its provisions are in any respect unfavourable to the case of the mortgagee. With the exception of the case before the Vice-Chancellor Sir W. P. Wood, no authority bearing directly upon the point was cited in the argument, nor have I *been * 192 able to find any. We must look at the case, therefore, upon principle; and looking at it in that point of view, and having regard to what has been already said as to the relative positions of mortgagees and mortgagors, I think the right conclusion is, that a just medium must be taken between the difficulties to which I have referred, and that it ought to be held that the mortgagee has the right prudently and properly, and exercising the sound discretion which a prudent owner would exercise, to employ the ship at the risk of the mortgagor.

The cases as to mines seem to me to bear out this view. There is a difference, indeed, between the case of a mine and of a ship. The mine might be drowned if the working was not continued; but this, I think, is a difference rather in extent than in principle, for a ship, if laid up, could hardly be preserved from deterioration. The case of a mortgage of a share of a ship seems to me, also, to furnish a strong argument in favour of the view which I have taken of the right of the mortgagee. It would be difficult to say that there can be one rule as to a mortgagee of a share of a ship, and a different rule as to a mortgagee of an entire ship; and surely it would be going too far to say, that a mortgagee of a share of a ship

is bound not to concur in a voyage on which his co-owners have determined, and to require security to be given for the value of the share, rather than to take part in the voyage.

It is therefore upon the special circumstances of this case, and not upon the ground of the mortgagee not being entitled to use or employ the ship prudently and in the due and ordinary course, that I concur in the principle of this decree; but agreeing in the principle of the decree, I regret to say, that I find myself unable to concur in the details of it. The Vice-Chancellor has

* 193 * charged the defendants with the value of the ship at the time when they took possession of her. They took possession as mortgagees, and the acts done by them, although not done in the due exercise of their rights as mortgagees, were nevertheless, as it seems to me, done by them in that character. They had no power or authority to convert themselves into owners, and I am aware of no case in which the Court has dealt with the mortgagee as owner, and charged him with the value of the mortgaged property as if he had become so. There may possibly be cases in which it may be right to do so, where, for instance, there is a distinct and independent equity, but so far as I can see, there is none such in this case, and I think there is great danger in deviating from the settled forms of decrees, which furnish the best evidence of the law of the Court, and introducing new forms by which the law of the Court may be unsettled. A mortgagee of houses or lands, occupying the houses or farming the lands, is chargeable with an occupation rent,¹ and upon the same principle I think the defendants ought to be charged with what the vessel might have earned if chartered in the ordinary course. I think, too, that the defendants ought to be charged with any damage, beyond ordinary wear and tear, which may have arisen in the course of their employment of the vessel; but with all respect to the Vice-Chancellor, and all deference to the Lord Chancellor and my learned brother, I think the decree should have gone no further, except of course in the usual direction as to wilful default. In my opinion, therefore, the decree ought to be altered in the mode which I have pointed out; but the Lord Chancellor and my learned brother being of opinion that the decree, as it stands, ought to be affirmed, of course the appeal must be dismissed.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1239, 1241.

* In the Matter of THE AGRICULTURIST CATTLE * 194
INSURANCE COMPANY,

AND

In the Matter of "THE JOINT-STOCK COMPANIES WIND-
ING-UP ACTS, 1848 and 1849," and "THE JOINT-STOCK
WINDING-UP AMENDMENT ACT, 1857."

1861. May 30. June 3. Before the LORDS JUSTICES.

An order having been made for winding up a company, A. was proposed as official manager by one contributory, B. by another. The chief clerk decided to appoint B., and refused an application by A.'s proposer to adjourn the question to be considered by the Judge personally. The Judge, on being applied to, refused to disturb the appointment unless it was shown that B. was an unfit person. *Held*, on appeal, that as the Judge had not personally decided the question which of the two persons proposed was more eligible, the appointment ought to be discharged without prejudice to the Judge's re-appointing B., if in the exercise of his discretion he should think fit to do so.

Per the Lord Justice TURNER: In proceedings in Chambers every party has the unqualified right to have his case heard by the Judge personally if he requires it; and the chief clerk cannot refuse an application to have it so heard.¹

THIS was a motion by way of appeal from two orders of the Master of the Rolls, by the first of which Mr. Henry Croydill was appointed official manager of the company which was in course of winding-up. The second order was made on an application by Josiah Graham Lowe, the present appellant, to discharge the first-mentioned order, and by it his Honor ordered the costs of Mr. Croydill to be paid out of the estate, but made no further order on the application.

On the 20th of April, 1861, an order was made by the Master of the Rolls for winding up the company, and the 8th of May was fixed for the appointment of an official manager. The appellant Mr. Josiah Graham Lowe, who was a holder of 1781 shares in the company, attended by his solicitor at the Chambers of the Master of the Rolls and proposed to the chief clerk a Mr. Evans to be official manager. Another shareholder * proposed Mr. * 195 Croydill, taking an objection to Mr. Evans on the ground

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1327.

that he was nominated by Mr. Lowe who had formerly been one of the directors.

The managing clerk, who attended personally in Chambers on behalf of Mr. Lowe, after stating the above facts deposed as follows : —

“ The said chief clerk then said that he thought he ought to appoint the said Mr. Croysdill, the nominee of an independent shareholder, after what had appeared about the said J. G. Lowe. I then said that I desired to take the opinion of his Honor the Master of the Rolls on the subject, and requested the said chief clerk to adjourn the matter to be heard by his Honor in person. The said chief clerk refused to adjourn the matter, and said that he should make the appointment, and that if I was dissatisfied I must move to discharge the order.

“ On the 9th inst. (May, 1861) I attended before his Honor the Master of the Rolls and asked that the matter of the appointment of the official manager of the company might be set down for hearing by his Honor in person as an adjourned summons, and I informed his Honor that the said chief clerk had refused to adjourn the matter. His Honor then informed me that the said chief clerk had acted in accordance with his instructions, and that his Honor would only review the decision of the said chief clerk on the matter being brought before his Honor by summons to discharge the order, and that his Honor would not order the matter to be brought before him as adjourned. ”

A summons was accordingly taken out to discharge the order, and counsel attended before the Master of the Rolls on the
 * 196 10th of May. Upon the case being opened * his Honor asked Mr. Lowe's counsel whether he could show that Mr. Croysdill was an unfit person for the post of official manager. The answer given was in substance that it was not alleged that Mr. Croysdill was an unfit person, but that Mr. Evans was a more fit one ; upon which his Honor stated that he should not interfere with the appointment, and made the second order appealed against. ”

Mr. Daniel and Mr. Bush, for the appellant. — We submit that the Master of the Rolls has acted erroneously in treating the chief

clerk as having authority analogous to that of a Master in Chancery. We contend that under 15 & 16 Vict. c. 80, 29, 33, every suitor has a clear absolute right to take the opinion of the Judge, directly, and not by way of appeal, upon any point arising in Chambers. If the chief clerk were an officer to whom the making such appointments as this could be delegated, no doubt it would be incumbent on us to show that he had appointed an objectionable person, but he is not such an officer; the power of appointment rests not in him, but in the Judge in Chambers, and our ground of complaint is that the Judge has not exercised his judicial discretion as to which of the two persons proposed was the most proper person.

Mr. Roundell Palmer and *Mr. Roxburgh*, in support of the orders.—The Judges are empowered to authorize their chief clerks to dispose of certain matters, and without some such rule as that adopted by his Honor the Master of the Rolls the business in his Chambers could hardly be got through. It is understood to be the practice of his Honor to delegate the appointment of official managers to his chief clerk, but no doubt before signing the appointment he satisfied himself that it was a proper one.

* *Mr. Daniel*, in reply.—The question whether it would * 197 be convenient for the chief clerks to have a part of the independent though subordinate authority possessed by the Masters has, I submit, been disposed of by the legislature in the Masters' Abolition Act, which has transferred the jurisdiction of the Masters not to the chief clerks but to the Judges, and in terms showing that the suitors are entitled to the opinion of the Judge himself upon each point as it arises.

THE LORD JUSTICE KNIGHT BRUCE.—It is my opinion, and I believe that of the Lord Justice also, that this whole matter should be submitted, or again submitted, if that is the correct phrase to use, for personal consideration to the Master of the Rolls, and that the two orders appealed from should be discharged without prejudice to the Master of the Rolls' exercising his discretion in such a manner as to appoint *Mr. Croysdill* again if it shall so seem fit to his Honor. The costs to the present time to be paid out of the estate.

THE LORD JUSTICE TURNER. — This is an application to discharge two orders of the Master of the Rolls, by the first of which orders, dated the 8th of May last, his Honor appointed Mr. Croysdill to be the official manager to this company ; and by the other of which orders his Honor refused an application to discharge the order of the 8th of May. The case stands thus, — it originally came before the chief clerk of the Master of the Rolls, upon the application for the appointment of an official manager. There were proposals before the chief clerk of two different persons for the appointment; one party proposing Mr. Croysdill, * 198 * the other a Mr. Evans to be the official manager. The chief clerk appears to have entertained a strong opinion in favour of Mr. Croysdill, and to have intimated his intention to appoint him. An application was then made to the chief clerk to adjourn the matter to be heard before the Master of the Rolls in person, but he declined to adjourn it, and appointed Mr. Croysdill. Application was then made to the Master of the Rolls to discharge the appointment which his chief clerk had made, but his Honor, upon that application coming before him, required it to be shown that Mr. Croysdill was an improper person to be appointed, and, this not having been shown, he declined to interfere and refused to set aside the appointment. The result therefore has been that the comparative merits of those two gentlemen have never been under the personal consideration of the Master of the Rolls, nor has he heard the parties upon it. His Honor no doubt in point of fact considered the question whether Mr. Croysdill was or was not a proper person to be appointed at the time when he signed the order of the 8th of May ; but then he came to this conclusion on the point without having heard the parties upon it. If I may venture to say so without presumption, the public are very much indebted to the Master of the Rolls for the great proportion of the business of the Court which he disposes of most ably and efficiently for their benefit, and they are much indebted also to the chief clerks for their very able services ; but in despatching the business of the Court regard must be had to the rights and interests of the suitors, and I cannot agree that any suitor of the Court has not the right and the unqualified right to have his case heard before the Judge in person if he so desires. I think therefore that the chief clerk had no right to refuse the

application which was made on the part of the appellant to have his case heard before the *Master of the Rolls. If we * 199 look at the case with reference to the practice of the Court of Chancery, the right to be heard before the Judge is by the Act of Parliament in terms reserved to the suitors. If we look at the case with reference to the Winding-up Act, the powers which by that Act are given to the Masters are, as I apprehend, now to be exercised by the Judge. Nothing could I think be more detrimental to the interests of the suitors of the Court than that the chief clerks should be put in the position which the Masters formerly held. Whether therefore the case be governed by the Chancery practice or be considered as falling under the Winding-up Act, it was for the Judge, after hearing the parties and considering the reasons they assigned, to determine who should be appointed to be the official manager.

There is another point in this case on which I will venture to observe. I am not disposed to think that the fact of an accountant having been before concerned in some winding-up matters ought to be conclusive on the question whether he should be appointed official manager to another of such matters. The effect of its being so considered would be to create a monopoly in the office of official manager in favour of particular persons. I think that in determining the question who should be appointed to be official manager, regard ought to be had to what the duties of official managers really are. It is not their duty to determine the legal questions which may arise in the course of the winding-up. They are in the position of accountants, bound to render the best assistance in their power on the questions which may arise, and to see, so far as they can, that those questions are brought conveniently and properly before the Judge, and further to render their aid in the settlement of the different accounts. Too much weight, therefore, ought not, as it seems to me, to be * given to the fact of Mr. Croysdill having been an official * 200 manager on former occasions. Any skilled accountant may, I think, be as fully capable as Mr. Croysdill of discharging the duties of official manager to this company. Accountants are not officers of the Court, and are not recognized by it as standing in that position, and I very much object to any such notion getting abroad.

My opinion therefore is, that both these orders ought to be dis-

charged, and, looking at all the circumstances of the case, I think that all the costs up to the present time ought to be paid out of the estate. It must be understood that nothing that I have said is in any way to prejudice any future question as to who ought to be appointed to be the official manager of this company. I repeat that, in my opinion, parties who desire to be heard before the Judge are entitled to be so heard.

*** 201 * In the Matter of The ABERYSTWITH AND WELCH
COAST RAILWAYS.**

1861. June 5. Before the LORDS JUSTICES.

When a deposit has been paid into Court under the standing orders of Parliament in respect of several undertakings comprised in one bill, and the bill is subsequently withdrawn as to some only of the undertakings, the promoters cannot, upon certificate of such withdrawal, procure at once the payment out of Court of so much of the deposit as is attributable to the abandoned undertakings.

In this case a bill had been introduced into Parliament for making eight railways from Aberystwith to different places. The promoters, in compliance with the Act 9 & 10 Vict. c. 20, and the standing orders of Parliament, had paid into Court a deposit of eight per cent upon the estimated cost of all the railways. Subsequently they determined to abandon the project as regarded three of the lines, and they procured the certificate of the speaker of the House of Commons that the bill, so far as regarded these three lines, had been withdrawn. They then petitioned for payment out of Court of a part of the deposit, bearing the same proportion to the whole as the estimated cost of the three abandoned lines bore to the estimated cost of the eight lines. The petition came before Vice-Chancellor KINDERSLEY, who desired that the question might be brought before their Lordships whether a partial withdrawal of a bill came within the meaning of 9 & 10 Vict. c. 20, § 5, which authorizes the promoters to apply for a return of the deposit "if such petition or bill shall be rejected or finally withdrawn by some proceeding in either House of Parliament."

Mr. Lonsdale, for the petitioners.

Their Lordships held that an order ought not to be made, there having been a withdrawal of part only of the bill.

NOTE. — See The Aberystwith and Welsh Coast Railway Act, 1861, 24 & 25 Vict. c. clxxxi. § 46.

* MACLAREN v. STANTON.

* 202

1861. June 6, 7. Before the LORDS JUSTICES.

A person who was a shareholder in and manager of a company, bequeathed some of his shares specifically to several persons absolutely, and gave the residue of his property to tenants for life, with remainders over. After his death it was discovered that large sums were due from him as manager to the company, and a compromise was entered into with the sanction of the Court, by which his estate was to pay the company 220,000*l.*, a considerable part of which was attributable to interest accrued during the testator's life on the sums due from him. Immediately after the payment the company disposed of this sum by declaring a bonus on its shares.

Held, that the whole of the bonus on the shares specifically bequeathed belonged to the specific legatees.

Held, also, that, as between the tenants for life and remainder-men, the whole of the bonus on those shares which formed part of the residue belonged to the tenants for life as income.¹

Figures used by a testator in a hotch-pot clause, held to be merely used for the sake of giving an example to explain what the testator understood by hotch-pot.

¹ The subject of the respective rights of the tenant for life and remainderman in such cases is discussed with great wealth of learning and citation by Mr. Perry, in his *Treatise on Trusts*, § 545. See *Maclaren v. Stanton*, L. R. 4 Eq. 448; S. C. 11 Eq. 382; *Minot v. Paine*, 99 Mass. 101; *Daland v. Williams*, 101 Mass. 571; *Kinmonth v. Brigham*, 5 Allen, 270; *Leland v. Hayden*, 102 Mass. 550; *Read v. Head*, 6 Allen, 174; *Atkins v. Allen*, 12 Allen, 359; *Straker v. Wilson*, L. R. 6 Ch. Ap. 503; *Ricketts v. Harling*, *Weekly Notes* (Dec. 1870), 260 V. C. M.; *Ibbotson v. Elam*, L. R. 1 Eq. 188; *Bates v. Mackinley*, 31 Beav. 280; *In re Barton's Trust*, L. R. 5 Eq. 238; *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 630; *Earp's Case*, 28 Penn. St. 368; *Pratt v. Pratt*, 33 Conn. 446; *Van Doren v. Olden*, 4 C. E. Green, 117; *Wiltbank's Appeal*, 64 Penn. St. 256; *De Gendre v. Kent*, L. R. 4 Eq. 283; *Brown v. Gellatly*, L. R. 2 Ch. Ap. 755; *Hooper v. Rossiter*, *McClell. 527*; *Cox v. Cox*, L. R. 8 Eq. 343; *Turner v. Newport*, 2 Ph. 14; *In re Grabowski's Settlement*, L. R. 6 Eq. 12; *Balch v. Hallet*, 10 Gray, 402.

HENRY STANTON, the testator in this cause, was at his death, in December, 1851, entitled to eighty-one shares in the Carron Iron Company. By his will, dated the 12th of October, 1846, he gave ten of them specifically to his son Henry Tibbatts Stainton, and another ten of them to James Joseph Stainton. The rest formed part of his residuary personal estate, which, after payment of his debts, was directed to be divided into eight equal parts; two of which parts were directed to be allotted to each of his sons, one to the children of E. Brown a deceased daughter, and one to each of his three surviving daughters. The allotted share of each son and daughter was given to such son or daughter for life, with remainder to his or her children, the terms of the will being such that the shares in the Carron Company would not have to be converted. The will contained the following clause:—

“ And whereas on the marriage of my said late daughter Elizabeth with S. W. Brown, I transferred to the trustees of her marriage settlement 2000*l.* stock of the East India Company, which I deem to be of the value of 5000*l.*, and to produce 210*l.* per annum; and on the marriage of my said son Henry * 203 Tibbatts Stainton with his present wife, I * transferred to the trustees of his marriage settlement the sum of 10,000*l.* stock of the governor and company of the Bank of England, which I deem to be of the value of 20,000*l.*, and to produce the sum of 700*l.* per annum; and I may advance or give property to or with my other children on their respective marriages, or otherwise for their respective advancement in the world: Now I do hereby declare my will to be, that the advancements so made to the said Elizabeth Brown and H. T. Stainton as aforesaid shall be brought into hotch-pot and accounted for upon the following principle: Supposing the income of the residuary property divisible under this my will in respect of my children as aforesaid shall amount to the annual sum of 4000*l.*, to this shall be added the annual sum of 210*l.*, the income of the fund advanced to the said Elizabeth Brown, and 700*l.*, the income of the fund advanced to the said H. T. Stainton, making together the annual income of 4910*l.*, which, being divided into eight shares, leaves the annual sum of 613*l.* 15*s.* for each one-eighth part. The two-eighths directed to be allotted in respect of the said H. T. Stainton would therefore amount to 1227*l.*, 10*s.*; from this is to be deducted the annual income of the fund settled upon

him, viz. 700*l.* per annum, so that his income of the share allotted in respect of him of and in my residuary property would amount to the annual sum of 527*l.* 10*s.* The income of the share in respect of the said E. Brown would be 613*l.* 15*s.*; from this is to be deducted the annual sum of 210*l.*, the income of the fund settled upon her as aforesaid, leaving the annual sum of 403*l.* 15*s.* as the income of her share to be allotted in respect of her children in my residuary property under this my will. The said James Joseph Stainton the annual sum of 1227*l.* 10*s.*; Sarah Ann Stainton the annual income of 613*l.* 15*s.*; Charlotte Stainton the annual income of 613*l.* 15*s.*, and Caroline Mary Stainton the annual income of 613*l.* 15*s.*, which * annual sums of * 204 527*l.* 10*s.*, 403*l.* 15*s.*, 1227*l.* 10*s.*, 613*l.* 15*s.*, 613*l.* 15*s.*, and 613*l.* 15*s.*, make up the annual sum of 4000*l.* And in case I advance or give property to any other of my children, I direct that the same principle shall be adopted in bringing the same into hotch-pot as I have hereinbefore directed with reference to the property advanced to my said daughter Elizabeth Brown and my said son H. T. Stainton."

The testator had, from 1808 till his death, been the manager of the Carron Company in London. Upon his death the company made large claims against his estate in respect of their moneys which had come to his hands, and refused to transfer the shares standing in his name. A bill was filed by the executors to compel them to do so, and ultimately a compromise was made, on the terms, that the executors should pay the company 220,000*l.*, and that the company should allow the transfer of the shares. This compromise became the subject of litigation, and the question was brought before the Court of appeal, whether it extended to all claims against the testator's estate or only to claims arising on the accounts subsequent to 1825. Their Lordships decided that it only had the more limited effect. Such of the parties interested in the testator's estate as were *sui juris*, were willing to give effect to the compromise on this footing, and it was approved by the Court on behalf of those who were infants. The result was, that the 220,000*l.* was paid out of the estate of the testator to the company, and the shares were transferred, as to ten into the name of H. T. Stainton, ten into the name of J. J. Stainton, and the rest into the names of the executors. The payment of the 220,000*l.* was made

on the 17th of May, 1858, along with a small further sum, 42*l.* 16*s.* 1*d.* for interest. Of the total sum thus paid 191,664*l.* 2*s.* 4*d.*

* 205 was principal with interest up to * the death of the testator, and 28,397*l.* 13*s.* 9*d.* interest accrued since his death. On the 26th of May, 1858, the company upon sanctioning the transfers declared a bonus of 470*l.* per share upon all their shares, such bonus arising from the division among the shareholders of the 220,042*l.* 16*s.* 1*d.* thus received from Stainton's estate. The shares which had belonged to Stainton having the benefit of this bonus, various questions arose as to the mode of dealing with it. The Master of the Rolls decided the following points:—

1. That the sons were not entitled to the whole of the bonus on the shares absolutely bequeathed to them, but only to a part of it bearing to the whole the same proportion as 28,397*l.* 13*s.* 9*d.* to 220,042*l.* 16*s.* 1*d.*, and that the rest of it, *i.e.*, so much as was attributable to principal and interest accrued due in the testator's life, fell into his residuary estate, as capital.

2. That the tenants for life of the remaining shares were not entitled to the whole of the bonus on those shares as income, but only to a part of it bearing to the whole the same proportion as 28,397*l.* 13*s.* 9*d.* to 220,042*l.* 16*s.* 1*d.*, and that the rest of it was to be dealt with as capital.

3. That the advances to Elizabeth Brown and H. T. Stainton were not to be brought into hotch-pot at the amounts mentioned in the will, irrespective of their real values, for that the figures were only given to show what the testator intended by hotch-pot, and that the advances must be brought into hotch-pot according to the income they were producing at the end of a year from the testator's death.

From the order proceeding on this footing several appeals were brought.

* 206 * *Mr. Roundell Palmer* and *Mr. Lewin*, for the two sons. — As to the first point, we contend that the sons are entitled to the whole of the bonus on the shares specifically bequeathed to them. The testator directs his executors to pay his debts out of the general estate. His defalcations constituted a debt

due from him to the company at his death, and it is impossible for the residuary legatees to claim reimbursement as against specific legatees. The specific legatees take the shares as they stood at the testator's death, his estate being ample for payment of all his debts including that to the company, and as regards their shares they stand in just the same position as any other person who held shares in the company at the testator's death would stand, that is, he would have the shares with all the dividends and bonuses declared after the testator's death. That the company had a lien on the shares for the debt makes no difference for the present purpose. *Armstrong v. Burnett.* (a) Even if the shares had been mortgaged, the specific legatee would have been entitled to exoneration.

On the second point, the sons as tenants for life of shares in the residue contend, that the bonus on those shares which fell into the residue is to be treated as income. The cases are all inconsistent with such an apportionment as has been made. The question has always been, whether the sum divided has been profits for the year or capital; whether the company call it dividend or bonus is immaterial, the substance only is to be looked to: *Barclay v. Wainwright*, (b) *Price v. Anderson*, (c) and *Preston v. Melville*, (d) on the one hand, and *Paris v. Paris*, (e) *Brander v. Brander*, (g) *Witts v. Steere*, (h) * and *Hooper v. Rossiter*, (i) * 207 show how the rule is applied. This is not a fund reserved and accumulated; it is a windfall. Suppose neighbouring owners had run a mine into the company's land and worked it for some years, and the company on discovering it had recovered large damages which were then divided among the proprietors, the amount so divided would be income. *Johnson v. Johnson*, (k) *Plumbe v. Neild*. (l)

As to the third point, we say that the income of the advances is to be taken at 700*l.* and 210*l.*, at which the testator estimates it. He uses hypothetical words as to the income of his residue, but not as to the income of the advances. There cannot be any right to have the income readjusted every year, which is what Mrs. Browne's children contended for.

(a) 20 Beav. 424.

(b) 14 Ves. 66.

(c) 15 Sim. 473.

(d) 16 Sim. 163.

(e) 10 Ves. 185.

(g) 4 Ves. 800.

(h) 13 Ves. 363.

(i) 13 Price, 774.

(k) 15 Jur. 714.

(l) 6 Jur. N. S. 529.

Mr. Lloyd, for the trustees. — If the specific legatees are not entitled to the bonus they have been overpaid, and the income to which they are entitled as tenants for life of shares in the residue ought to be impounded to recoup the testator's estate.

Mr. Selwyn and *Mr. Haynes*, for the testator's three daughters. — The Master of the Rolls, we submit, has rightly held that the testator did not intend to set a value on the advances, but merely used figures to show on what plan he intended the hotch-pot to be worked out. His estimate of the advances is hypothetical, just as his estimate of his whole income.

Mr. Follett and *Mr. Waller*, for the infant children of * 208 *Mrs. Browne*. — * As to the first point, the question arises under peculiar circumstances. The sum was paid under a compromise sanctioned by the Court, which cannot be taken to have been intended to alter the rights of the parties *inter se*. The accounts should be considered as taken up to the testator's death. There was a large amount of profits made by the company in past years which he had improperly retained and his estate had to repay it, but he was entitled himself to so much of it as was attributable to his own shares. There is in fact a set-off, the company being only entitled to claim from the testator the amount of defalcations, less the share of them which would come back to the testator as shareholder. The bonus on his shares was, except as to interest accruing after his death, an accumulation of profits made in his lifetime, and it is as much against reason that a specific gift of the shares should carry it as that a bequest of a bond debt should carry arrears of interest accrued in the testator's life.

As to the second point, the bonus cannot be income, as it is not shown to have been made out of the profits of that half year. *Hartley v. Allen*, (a) *Armstrong's Trust*. (b)

As to the third point, the natural interpretation is, that while the capital is not divisible the income is to be equalized *de anno in annum*.

Mr. Shapter and *Mr. Appach*, for the children of the tenants for life. — As to the first point, this bonus is not an accretion ; it is in

(a) 4 Jur. N. S. 500, V.-C. K.

(b) 3 K. & J. 486.

the nature of an unclaimed dividend; the right to it had accrued before the testator's death, though it had not * been * 209 declared. The company under their charter had no power to increase their capital, therefore profits must be treated as divisible when they accrued. *Fawcett v. Whitehouse*. (a) The testator could not intend to pass by his will to his specific legatees a share of a sum, the withdrawal of which from his residuary estate he never contemplated: *Harvey v. Cooke*, (b) *Circuitt v. Perry*, (c) and it is a breach of faith on the part of the specific legatees to claim it, the compromise having proceeded on the footing that the money payable would be part of the residuary estate. That the debt was due from the testator himself makes the case quite different from what it would have been if the debt had been due from a stranger. *Wallis v. Bastard*, (d) *Freeman v. Lomas*. (e) [*Wathen v. Smith*, (g) *Hickling v. Boyer*, (h) *Jones v. Mossop*, (i) were also cited.] As between the tenant for life and remainder-man, the bonus is capital. *Plumbe v. Neild*, (k) *Nicholson v. Nicholson*. (l)

Mr. Lewin, in reply. — Set-off is out of the question. The sum recovered might have been applied by the company in the purchase of mines or in any other way beneficial to their trade, no individual shareholder could claim to have a share of the 220,000*l.* paid to him until the company had declared a bonus. No right therefore to receive a share of the 220,000*l.* ever vested in the testator.

THE LORD JUSTICE TURNER. — Having had the opportunity of considering this case * since the Court rose yester- * 210 day, I do not think it necessary to delay giving my opinion upon it, especially as my learned brother and I are quite agreed upon the case. — [His Lordship then briefly stated the facts of the case, and proceeded as follows:] —

In this state of circumstances, one question which arises is, whether the portion of the amount received from the company in respect of the testator's shares (I do not at present designate the amount so received either as dividend or bonus) which has been

(a) 1 R. & Myl. 182.

(b) 4 Russ. 34.

(c) 23 Beav. 275.

(d) 4 De G., M. & G. 251.

(e) 9 Hare, 109.

(g) 4 Madd. 325.

(h) 3 Mac. & G. 635.

(i) 3 Hare, 568.

(k) 6 Jur. N. S. 520.

(l) 9 W. R. 676, V.-C. K.

received in respect of the ten shares specifically bequeathed to each of the sons of the testator formed part of the general estate of the testator, or belongs to the two sons? This is a question between the specific and the residuary legatees. Another question which arises is, whether the portion of the amount received from the company which has been received in respect of the testator's other shares, forming part of his residuary estate, is to be considered as capital or income. This is a question between the tenants for life of the residue and the parties entitled to it in remainder. The Master of the Rolls has thus dealt with these questions. He has divided the full amount received from the company in respect of all the testator's shares into two parts, according to the proportion which the amount treated upon the compromise as due to the company by the testator at the time of his death for principal and interest bears to the amount which upon the compromise was treated as due for interest accruing after the testator's death, and then as between the specific and residuary legatees he has given the residue so much of the full amount received from the company as according to the above apportionment was attributable to the principal and interest which was treated as due from the testator at the time of his death, giving to the specific legatees only

* 211 so much of * the full amount received from the company as, according to the apportionment, was attributable to the interest treated as accruing due after the death of the testator. He has dealt in the same manner with the tenants for life of the residue and the parties entitled to it in remainder, giving to the capital of the residuary estate so much as, according to the apportionment, was attributable to the principal and interest treated as due at the testator's death, and to the tenants for life so much only as, according to the apportionment, was attributable to the interest treated as having accrued after the death of the testator. Whether this mode of dealing with these questions was correct, or in what mode they ought to have been dealt with, is the principal point which we have to consider upon this appeal.

The ground on which the Master of the Rolls proceeded in disposing of these questions in the manner above mentioned was, as I understand, this: that at the time when the matter was before him, on the occasion of the compromise being proposed, — a compromise which required his sanction by reason of some of the parties interested in the residuary estate being infants, — he con-

templated and intended that what would be coming to the testator's shares from the amount which would be divisible by the Carron Company in consequence of the repayment made by the testator's estate should go back into the general estate of the testator ; but it is to be observed that there were other parties interested in this compromise, besides the infants on whose behalf the Master of the Rolls was called upon to sanction it. The specific legatees and the tenants for life of the residue, so far as they were not married women, or so far as being married women they had separate estates, were all competent to act for themselves, they were all interested in this compromise, and it does not appear

* that at any time during the proceedings before the Master * 212 of the Rolls on the subject of the compromise the question which is now raised was in any way mooted or brought to their attention. The position of the case therefore is this, — That the compromise, resting, in the view of the Master of the Rolls acting on behalf of the infants, upon one ground, may, as to the other parties, well have proceeded, and *primâ facie* I think it must on their part be taken to have proceeded, upon a wholly different ground. The question then is, whether in this position of the case we can as to those other parties treat this compromise as having proceeded upon the ground on which the Master of the Rolls, acting on the part of the infants, meant it to proceed. Can we say that there has since been an agreement on the part of those other parties which ought to be held binding upon them, so as to disentitle them to those rights to which they would otherwise have been entitled ? I do not think that we can. Possibly there may be some right on the part of the infants to be in some manner relieved as to the matters in question ; but I cannot see my way to give them the relief given by this order, or indeed any relief in this suit, so long as the compromise stands. With all deference to the Master of the Rolls, I find myself unable to follow the view which he has taken. Under ordinary circumstances the specific legatees would of course be entitled to the proportion of the whole amount received from the company which was due to the shares specifically bequeathed, and as the case now stands, I think we must consider them to be so entitled.

It may be right, however, to advert to some further arguments which were brought forward at the bar in support of this order.

It was said that there was here a case of set-off; that the
* 213 testator having been indebted to * the company in respect of his transactions as their agent, the amount in which he was so indebted to the company ought to be taken out of the amount received from the Carron Company in respect of the shares which belonged to his estate. It does not appear to me, however, that there is here any case of set-off. Until the debt due from the testator's estate was paid, and the dividend declared in consequence of the payment, there was no demand against the company on the part of the testator's estate. What was paid by the estate in respect of the testator's debt might have been applied in payment of other debts of the company, or in the purchase of further mines, or for other purposes of the trade, and might never have been divided at all among the shareholders of the company; so that the alleged case of set-off arises wholly from the subsequent application of the moneys paid by the estate, and there never was in fact any coexistent case of demand on the one side and debt on the other.

It was further said that the amount paid to the company by the testator's estate ought to be regarded as in the nature of an unclaimed dividend; but although it may well be regarded as an unclaimed debt, it certainly cannot be regarded as any thing in the nature of an unclaimed dividend, for it never was reserved on the part of the company, and the company never in fact knew of the existence of the fund till after the death of the testator. It was also attempted to be argued that this was not a debt within the meaning of that word as used in the testator's will; but that point seems to me to be so clear that it is quite unnecessary to say any thing upon it.

On the first point, therefore, I think that the specific legatees of the ten shares are entitled to the proportion of the amount
* 214 received from the company which was * due to those shares.

As to these legatees, there is no ground for distinguishing between interest and capital, the bequests of the shares being absolute.

As to the other shares, however, forming part of the residuary estate, the question arises whether what has been received in respect of them ought to be considered as capital or income. Several cases have been cited on that point, but I do not think it is

necessary to go through them, as they do not seem to me to affect the question. This is clearly not reserved capital which belonged to the company ; there was no intention on the part of the company to reserve it. It is nothing more than a debt which was due from the estate of Stainton to the company, and which was paid by the estate of Stainton after his death. In that state of circumstances, what is, in truth, the effect of that payment ? If a debt which is due to a partnership is paid in any given year, the money received in respect of it must, as I apprehend, in the absence of any special provision to the contrary, and there is none such in this case, constitute part of the profits of the year in which the debt is paid. In the course of the argument this case was put : suppose this to have been a sum which accrued due to the company in the course of the dealings and transactions between them and Stainton, and to have become due within the last two or three years, and to have been paid to the company by Stainton or by his executors after his death, could it be said that the sum so paid was not profit of the year in which it was paid ? No answer was given to the question ; and no other answer could, as I conceive, be given to it than that in the case supposed the debt would be profit of the year in which it was paid ; but if the debt would have been profit of the year had it arisen from the dealings and transactions of Stainton with the company, surely the nature of the transactions, * or the mode in which the debt was contracted, * 215 cannot alter the case. In order to constitute a debt capital, I apprehend you must show that there was an intention on the part of the persons interested that it should be dealt with as capital. If it has been reserved and set apart as capital, it would, as I apprehend, of course be capital as between the tenant for life and remainder-man ; but if it has not been so reserved and set apart, and there be nothing more than that the debt has been got in, it must, as I conceive, be considered as income, and not capital.¹ I think, therefore, upon the true result of this case, the whole of the dividends on these shares belong to the tenants for life of the residue, and cannot be considered as capital. I do not see how this is to be distinguished from the case of any other debt. Nothing, as I have said, can depend on the mode in which the debt arises.

¹ See *In re Barton's Trusts*, L. R. 5 Eq. 244 ; *Ricketts v. Harling*, W. N. (Dec. 1870) 260 ; *Minot v. Paine*, 99 Mass. 101, 111, 112.

There remains, then, only the question on the hotch-pot clause ; and I agree with the Master of the Rolls in the construction which he has put on that clause. The case is peculiar, but it seems to me that what the testator has said is only an explanation, for the purpose of showing, the principle of division. What he has said is in substance this : " I take 4000*l.* as the income of my property ; I add to that the income which shall come from the bank stock and East India stock, and divide it as follows, and you are to do the same with the income whatever it may happen to be. If the income happens to be 20,000*l.* a year, take 20,000*l.* instead of the 4000*l.* If I have made advances to my other children, take the interest on those advances on the same principle as I have made the computation on the bank stock and India stock, and divide accordingly." It seems to me, therefore, that the Master of the Rolls has, upon this part of the case, adopted the right principle.

It may be open to some doubt whether the amount should
 * 216 be taken * at the death of the testator or at the end of the year after his death ; but I think that the right principle is, that it should be taken at the end of the year after his death. As to the residue, I may observe that there is no residue until the expiration of the year. I make that observation, however, with some caution, as we know that an observation of that kind has given rise to great confusion in other cases between tenants for life of residue and the parties interested in the capital. Many cases, I believe, have come before the Courts in consequence of the unguarded use of the word residue in a case that occurred before Sir JOHN LEACH, who said that there was no residue until the end of the first year, and that, therefore, the interest of the first year fell into the capital of the estate. Of course I do not mean by the observation I have made to revive any question on that point. My opinion, therefore, agrees with that of the Master of the Rolls as to the hotch-pot clause,¹ but I differ from him as to the question of the rights of the specific legatees and of the tenants for life of the residue.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion. There will be one order on the several motions.

¹ See *Fox v. Fox*, L. R. 11 Eq. 142.

* THE EMPEROR OF AUSTRIA v. DAY and KOSSUTH. * 217

1861. May 22, 23, 24. June 7. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The defendant Kossuth, a Hungarian refugee, caused to be manufactured in England a large quantity of notes, which, though not made in imitation of any notes circulating in Hungary, purported to be receivable as money in every Hungarian state and public pay office, and to be guaranteed by the state of Hungary. The plaintiff, as King of Hungary, sued to have these notes delivered up and to restrain the manufacture of any such, alleging that the issue of such notes would injure the rights of the plaintiff by promoting revolution and disorder, would injure the state by the introduction of a spurious circulation, and would thereby also injure the plaintiff's subjects.

Held, that, although the Court has not any jurisdiction to restrain the commission of acts which only violate the political privileges of a foreign sovereign,¹ the manufacture of these notes ought to be restrained.

Per the Lord Chancellor: A foreign sovereign may sue in this country for a wrong done to him by an English subject, unauthorized by the English government, in respect of property belonging to that foreign sovereign, either in his individual or his corporate capacity, or to his subjects,² and the circulation of spurious notes purporting to be guaranteed by the nation is such a wrong.

Per the Lord Justice TURNER: The plaintiff, as representing his subjects, was entitled to relief on account of the pecuniary injury which a spurious circulation would inflict on them; but *quære*, whether he would have been entitled to relief on the ground of the loss arising to the state from such spurious circulation — the issue of such notes being, so far as such loss only was concerned, a mere invasion of the prerogatives of a foreign sovereign and the political rights of his subjects.

THIS was an appeal from the whole of a decree of Vice-Chancellor STUART, restraining the defendants from making notes purporting to be notes of the Hungarian state, and ordering them to deliver up to the plaintiff the notes already made and the plates used for printing them.

The case made by the bill was in substance as follows: —

That the plaintiff was King of Hungary, and as such had the exclusive right of authorizing the issue in Hungary of notes to be

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 17, 18; Kerr Inj. 2, 3.

² See *United States of America v. McRae*, L. R. 4 Eq. 327; S. C., L. R. 8 Eq. 69; S. C., L. R. 3 Ch. Ap. 79; *United States of America v. Wagner*, L. R. 2 Ch. Ap. 582; 1 Dan. Ch. Pr. (4th Am. ed.) 17; *United States v. Prieau*, 2 H. & M. 559; *King of Spain v. Machado*, 4 Russ. 225.

circulated in Hungary as money, and also the exclusive
 * 218 right of authorizing the royal arms of * Hungary to be
 affixed to any document intended to be circulated in that
 country.

That nearly the whole of the circulation of Hungary consisted
 of notes of the National Bank of Austria, issued under the author-
 ity of the plaintiff as Emperor of Austria and King of Hungary,
 which circulated in Hungary as money, and were for various sums
 from one florin upwards.

That the defendants Day & Sons (the well-known lithographers)
 had by the direction of the defendant Kossuth prepared plates for
 printing notes purporting to be notes of the Hungarian nation or
 state, for various sums of money, and which were intended to be
 circulated as money in Hungary, and that they were engaged by
 the direction of Kossuth in printing such notes from the plates.

That the body of each note was in the Hungarian language, and
 had on the border, in the German and Sclavonian and other lan-
 guages, the amount for which it purported to be a note, and at the
 bottom a print of the royal arms of Hungary. The body of a one
 florin note, when translated, was as follows:—

“ One florin.

“ This monetary note will be received in every Hungarian state
 and public pay office as

“ One florin in silver.

“ Three zwanzigers being one florin, and its whole nominal
 value is guaranteed by the state.

“ In the name of the nation,

“ KOSSUTH, LOUIS.”

That the total amount of these notes which was being pre-
 * 219 pared was upwards of 100,000,000 florins. That Day * &
 Sons had in their possession a large quantity of them entirely
 or nearly completed, and, unless restrained by the Court, would
 deliver them to Kossuth. That Kossuth intended, as soon as he
 received them, to send them to Hungary and endeavour to intro-
 duce some of them into circulation there, and use the remainder
 for other purposes in Hungary, in violation of the rights and pre-
 rogative of the plaintiff as king of that country, and, amongst
 other purposes, for the promotion of revolution and disorder

there. That the plaintiff had never authorized the manufacture of the notes or the use of the royal arms of Hungary thereon; and that the introduction of the notes into Hungary would create a spurious circulation there, and by that and other means cause great detriment to the state and the subjects of the plaintiff. That Day & Sons had notice of the purpose for which the notes were intended, and of Kossuth's want of authority to prepare or issue them.

The bill prayed that Day & Sons might be decreed to give up to the plaintiff the plates, and any documents printed or lithographed therefrom, and any other documents in their possession purporting to be notes of the Hungarian state or nation, or notes with the royal arms of Hungary thereon, and for an injunction restraining Day & Sons from printing or delivering to Kossuth any such notes.

M. Kossuth by his affidavits denied that the plaintiff was *de jure* King of Hungary, and entered at length into the grounds of this contention. He also denied the plaintiff's being *de facto* King of Hungary on the ground that he had not been crowned King of Hungary, as was required by the fundamental laws of that country. He asserted that the emperor had no authority to issue notes without the consent of the diet; that the diet had, in * 1848, * 220 authorized him, Kossuth, when minister of finance to Ferdinand V., to issue notes, but had never given such authority to any one else. That such notes were issued, bearing his own official signature as minister of finance, but did not resemble the notes now in question. That the arms of Hungary were not royal but national, and that any Hungarian might lawfully use them. That the use of them in Hungary without royal authority was common; and that they were introduced into the notes, not to give them any authenticity, but merely as a national emblem. He proceeded to say, "It is not true, but it is wholly and entirely contrary to the truth, that I have intended, as soon as I receive the notes, falsely in the said bill called spurious notes, to send them to Hungary, and to sell some of them for divers sums of money to any persons resident there or elsewhere, and by this and other means to introduce the same into circulation in Hungary. . . . I affirm and declare the fact to be, that, the present state of Europe and of the Austrian government being such as to make the happening of great changes in the relations of lawful right and the

dominion of force seem not only possible but probable, I deemed it to be my duty to take such means as I was able to meet such an emergency as might then probably arise, and to prevent the subjects and state of Hungary from suffering the detriment that would necessarily follow from the want of a sufficient means of circulation as money, and I have accordingly had the notes in the said bill named, prepared, and made ready, but had already before the filing of the said bill made provision for their safe-keeping in England until the happening of the emergency which could alone make the use of them in Hungary to be consistent with events. And I affirm and declare, that I neither have attempted, nor have ever had the intention to attempt, to introduce the said notes into

Hungary, so long as the present condition of forcible dominion exists * there. What the plaintiff calls 'revolution,' but which will in fact be the restoration of the laws and rights of Hungary, must itself have happened in Hungary before the notes in the said bill named can acquire the value of which the plaintiff expresses so much fear, through their circulation in the kingdom of Hungary."

It appeared that the notes in question were not similar in appearance to any notes circulating in Hungary.

The Vice-Chancellor STUART having made a decree according the prayer of the bill, the defendants Kossuth and Day & Sons severally appealed.

Mr. Roundell Palmer, Sir H. M. Cairns, and Mr. Cotton, for the plaintiff, in support of the decree. — The first point set up by the defendant relates to the plaintiff's title to the crown of Hungary.

[THE LORD CHANCELLOR. — Surely that question depends merely on this, whether the plaintiff is acknowledged by her Majesty's government as *de facto* King of Hungary, and we are bound to take judicial notice of the fact that he is so acknowledged. We cannot enter here into the question whether he is rightfully King.]

As to the Hungarian law with reference to the circulation of paper money, the evidence of the defendants leaves untouched this proposition, that whatever may be the extent of the rights of the diet as to interfering with the issue of paper money, it cannot be issued without the concurrence of the Crown, and the issuing it is the act of the Crown.

As to the use of the royal arms, it may be common to use them as an ornament to private documents; but the question is, for what purpose are they used. Here they * are evidently * 222 used to give these spurious notes the appearance of public documents.

As to the purpose for which these notes are manufactured, M. Kossuth denies his intention to circulate them at once, but expresses himself with studied ambiguity as to the nature of the occasion on which he intends to circulate them.

To apply the law to the facts of the case, we must consider the *locus standi* of a foreign sovereign in the Courts of our country. What is meant by the *dictum* that he can sue in this country? It cannot mean merely that he can sue for injuries affecting his own property or person, for if he were a private individual he could sue in respect of them, and nobody could contend that his being a sovereign would deprive him of the power to do so. The rule therefore must mean, that he can sue as a corporation in respect of the rights of the country which he governs. We may lay out of the question all cases where the subject-matter was an act of the state, as *Duke of Brunswick v. King of Hanover*, (a) *Secretary of State in Council of India v. Kamachee Boye Sahaba (The Tanjore Case)*, (b) *The Nabob of the Carnatic v. East India Company*. (c) So as to any belligerent right: thus, an injunction could not be obtained to stop munitions of war; that is not a matter relating to rights of property, and must be settled by diplomacy, not by the action of civil tribunals. The rule relates to rights of property concerning the nation. Each nation must have a head by which it is represented in foreign countries, otherwise it would have no means of asserting abroad civil rights belonging to it in its corporate * capacity, or belonging to the mass of its * 223 subjects. The cases of *The City of Berne v. Bank of England* (d) and *The Columbian Government v. Rothschild* (e) show that a bill on behalf of a nation, by a person not duly authorized to represent it, cannot be allowed. In *The King of Spain v. Hullett*, (g) the Lord Chancellor laid it down that the King of Spain, as to public matters, sued as a foreign corporation sole.

(a) 6 Beav. 1; 2 H. L. Cas. 1.

(b) 13 Moo. P. C. C. 22.

(c) 2 Ves. Jr. 56.

(d) 9 Ves. 347.

(e) 1 Sim. 94.

(g) 7 Bligh N. S. 359, 388.

In *Hullett v. King of Spain*, (a) Lord REDESDALE says, "I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war." *The King of the Two Sicilies v. Wilcox* (b) illustrates the distinctions between rights claimed by a foreign sovereign as rights of the Crown, and those which he claims as representing the country; the argument there being urged, that the plaintiff had no interest in right of his crown. So here it is attempted to meet the plaintiff's case by evidence to show that he has not the exclusive right to issue notes, inasmuch as he cannot issue them without the concurrence of the diet; but the answer to this argument is, that in the Courts of this country the plaintiff represents the Hungarian nation, including the diet. Then, is the right one which the King of Hungary, representing the nation, is entitled to have protected in our Courts? The right is the right of issuing money, there being no distinction for the present purpose between a metallic and a paper currency. This is a civil right of which the Court of Chancery can take notice; a right possessing a pecuniary value, and so savouring of

* 224 property: thus, for instance, the Bank of * England pays government a large sum for the exclusive privilege of issuing notes, which are a legal tender, and the act which we seek to restrain is the issuing notes purporting to be issued by the authority of the Hungarian nation, when they are not really so issued. The right is laid down by the jurists as to metallic currency. Heineccius, (c) Wolff, (d) Vattel, (e) Blackst. Comm. (g) The penal statutes do not exactly hit a case like the present, though they come very near to it: 14 Eliz. c. 3; 37 Geo. 3, c. 126, § 4; 11 Geo. 4 & 1 Will. 4, c. 66, § 19. There is no distinction between metallic and paper money for the present purpose, Pufendorf; (h) indeed, if there be any distinction, the principles laid down by the jurists apply more strongly to paper currency than to metallic, because the former has no intrinsic value. The statutes, which being penal statutes must be construed strictly, do not reach the

(a) 1 Dow & Cl. 169, 175; S. C. 2 Bligh N. S. 31, 60.

(b) 1 Sim. N. S. 332.

(e) Book 1, c. 10.

(c) Book 2, c. 8, §§ 174, 175, 178.

(g) Vol. 1, 277, Coleridge's ed.

(d) Part 8, c. 3, §§ 803, 806, 807.

(h) Book 5, c. 1, §§ 13, 14.

case, for these notes are no forgery, not being an imitation of any notes current in the plaintiff's dominions. What we rely on is, that each of these notes contains a statement that it will be received in every Hungarian public office, and that its payment is guaranteed by the state. It is a case of pretended agency. On the face of these notes M. Kossuth represents that he has the authority of the Hungarian nation to issue paper money, which is not the fact. That nation is now represented by the plaintiff, and it is no answer to our case to say, that a time may possibly come when it will not be so represented. When a felony has been committed, it is often necessary to pursue the criminal remedy before resorting to the civil one; but where criminal proceedings * cannot be resorted to, there is no suspension of the civil * 225 remedy: *Sloman v. Bank of England*; (a) and if the offence merely amounts to a misdemeanour, there is no suspension at all of the civil remedy. In *The Bank of England v. Anderson*, (b) and *Bank of England v. Booth*, (c) the Bank of England was protected in the enjoyment of a like right derived under a charter from the Crown. This was protecting the right in the stream; here we ask to have it protected in the fountain. Our case as regards the false representation that these notes are issued by the state, is made stronger by the fact that M. Kossuth once was a minister of state in Hungary. The case of trade-marks is not altogether like the present, but has much in common with it. No man has a right to pass off his goods as those of another man: that is the ground on which the decisions on trade-marks proceed. *Collins Co. v. Brown*, (d) *Collins Co. v. Cowen*. (e)

[THE LORD JUSTICE TURNER. — Would not an action lie in the cases of trade-marks?]

It is not to be assumed that an action would not lie in the present case, and even if it would not, it does not follow that an injunction would not go. In *Prince Albert v. Strange*, (g) Lord COTTENHAM repudiated the notion that an injunction could not be granted unless an action would lie. All that is necessary to found the jurisdiction of this Court is, that there should be a direct, clear

(a) 14 Sim. 475.

(d) 3 K. & J. 423.

(b) 2 Keen, 328.

(e) 3 K. & J. 428.

(c) 2 Keen, 466.

(g) 1 Mac. & G. 25, 46.

interference with a right clearly connected with property. Cases on the revenue laws have no bearing; there is no doubt that no state takes notice of the revenue laws of another. The issue of these notes would be politically mischievous, and that is one great reason, no doubt, why the plaintiff wishes to restrain * 226 it; but we do not ask for the injunction * on political grounds, but on the ground that the issue is an interference with a right of property of the plaintiff, and will inflict pecuniary injury on his subjects by bringing a quantity of spurious paper money into circulation. The result would be twofold; a number of the plaintiff's subjects would be defrauded by being induced to take spurious paper in the belief that it was genuine, and the whole paper currency of the country would be depreciated. As regards the Messrs. Day, we cast no personal imputation on them, but their case must stand or fall by that of *M. Kossuth*. *Farina v. Silverlock*. (a)

Mr. Collier, Mr. Giffard, Mr. C. T. Simpson, and Mr. Westlake, for M. Kossuth, and Mr. Bacon and Mr. Wickens, for Messrs. Day — The case made upon the bill is that the plaintiff is entitled to the exclusive control of the Hungarian paper currency as part of his royal prerogative, and that this right is invaded by the defendant. This is an allegation of a political offence, and this Court has no jurisdiction to prevent offences of that nature. The bill does not allege any injury to property. The right in question is not a right of property; it is a mere prerogative, and does not become a right of property because a profit may be made out of it. Even if it be a right of property at all, it is not such a right of property as this Court can take notice of. The rules of the Court as laid down in the case of the *Nabob of Arcot v. East India Company* (b) do not give a foreign sovereign any privilege over other suitors. The cases in which he has been allowed to sue have been cases of private right, not of injury done to him in his * 227 capacity of sovereign. The right * here alleged is a right of a public nature, the infringement of which is a crime, and this Court has no criminal jurisdiction: *Gee v. Pritchard*; (c) it can only deal with rights of property: *Clarke v. Freeman*, (d)

(a) 6 De G., M. & G. 219, 221, 222.

(b) 4 Bro. C. C. 179; and see note, *Hovenden Supp. to Ves. Jr.*

(c) 2 Swanst. 413.

(d) 11 Beav. 112.

Martin v. Wright. (a) The right as made out by the bill is a royal prerogative relating to revenue; it is not a right which can be recognized in foreigners. *Johnson v. Machielsen,* (b) *Lawrence v. Smith,* (c) *Smith v. Marconnay.* (d) The monetary laws of a foreign country can no more be recognized here than its fiscal laws, a monetary law being in fact a fiscal one. So the penal laws of a foreign country are not recognized. *Folliott v. Ogden,* (e) *Wolff v. Ozholm.* (g) The present is an application by a foreign sovereign to this Court to assist him in the financial department of his government. There is no case in which the Court has recognized the public prerogative of a sovereign; it is of the essence of such rights that they are not extra-territorial. The *jus cudendæ monetæ* is local, and has nothing to do with international law: it is purely territorial. There is no presumption in favour of the plaintiff's having such a prerogative as the bill alleges, and the evidence does not establish it. Suppose the right capable in some sense of being considered a private right, it is one for the infringement of which the bank of Austria could not sue: *Jefferies v. Boosey;* (h) so neither can the plaintiff. *Bank of England v. Anderson* depended on a special Act of Parliament. The right is analogous to the right of granting patents; the Queen could not sue within her own dominions for an injunction to restrain the infringement of it. The cases on trade-marks are wholly inapplicable; * for * 228 these notes are no imitation of any notes issued by the present government of Hungary, nor do they on the face of them purport to be issued by its authority; and they cannot mislead anybody, for they are signed by a person whose name is known throughout Europe as that of an exile most hostile to the present dynasty. There is not even an allegation that they can be mistaken for any notes now current. The evidence shows that the circulation of paper as money is opposed to the laws of Hungary, and there can be no just ground on which the Court can protect the plaintiff in the enjoyment of an illegal advantage. A foreign sovereign here has no privilege, he is in the same position as any other suitor, (i) and a private suitor would be out of Court if

(a) 6 Sim. 297.

(e) 1 H. Bl. 131; 7 T. R. 726, 733.

(b) 3 Campb. 44.

(g) 6 M. & Sel. 92.

(c) Jac. 471.

(h) 4 H. L. Cas. 815.

(d) 2 Peake, N. P. 81.

(i) Westlake on International Law, p. 175.

he came to enforce an illegal demand. Here a decree would protect the plaintiff in the exercise of a privilege to which he has no right. As regards injury to the plaintiff's subjects, the intention of M. Kossuth is to have notes ready against a future contingency, — not to circulate them now. They are of no use, and cannot be used unless and until the Emperor is dethroned ; and how can he sue to restrain an act which will have no effect in Hungary until he ceases to fill the character in which he now sues. The case of *Prince Albert v. Strange* turned on the privity and confidence between the plaintiff and the person who procured the etchings. Here no privity, agency, or confidence is alleged, nor any pecuniary damage ; the bill rests the case on a principle of international law. The cases of *Attorney-General v. Sheffield Gas Consumers Company*, (a) *Attorney-General v. Nichol*, (b) *Devonshire v. Newenham*, (c) and *Clarke v. Freeman* (d) show that the Court

* 229 does not * grant injunctions to restrain every kind of wrong.

[Eden on Injunctions, (e) *Barnett v. Chetwood*, (g) were also referred to.]

As regards the Messrs. Day, this decree is a confiscation of their property.

Mr. R. Palmer, in reply. — That paper money cannot be issued without an Act of the diet is immaterial ; it being enough for the present purpose that it cannot be issued without the authority of the plaintiff. The arguments on the other side resolve themselves into two points, — the constitution of the right which the plaintiff claims, and the nature of that right. It is true that it is a right constituted by the government of the foreign state, but it is nevertheless a right recognized by international law on account of its general importance to all countries. Our Courts may recognize the existence of a right which depends merely on the law of a foreign country. *Folliott v. Ogden*. (h) Cases of patent and copyright stand on quite a different footing, the right there conferred is only a right as against persons in the country. Then, as to the nature of the right, it is clearly a proprietary right. If the state issues paper money, it gets a profit ; if it delegates the power

(a) 3 De G., M. & G. 304, 320.

(b) 16 Ves. 338.

(c) 2 Sch. & Lef. 199.

(d) 11 Beav. 112.

(e) Page 316.

(g) 2 Meriv. 441.

(h) 3 T. R. 726.

of issuing it, it receives a price for that delegation. If M. Kossuth were what in these notes he assumes to be, they would be the property of the state. If circulated, they would form part of the currency of the country, which is the property of the nation. The issue of spurious notes tends to defraud the subjects of the state, who will be induced to accept them under the belief that they are government securities. The circulation of them is a * fraud in a matter of property, producing a depreciation of the currency and a disturbance of public credit. * 230

The case of trade-marks is analogous. The Court surely would restrain the issue of securities in the name of an individual without his authority; and why should not the issue of securities in the name of a nation without the authority of the nation in like manner be restrained? *Bromley v. Holland*, (a) *Farina v. Silverlock*. (b) To bring the case within *Simpson v. Lord Howden*, the instrument must show its invalidity on the face of it. *Clark v. Freeman* is inapplicable. It went expressly on the ground that Sir JAMES CLARK, as he did not manufacture pills, was suffering no injury to any proprietary right; but the state of Hungary does issue notes. *Martin v. Wright* goes on a similar principle, Martin not having exhibited his picture as a diorama. The plaintiff is entitled to relief, being the representative of the nation, both as regards a wrong done to it in its collective capacity and as regards wrongs done to the mass of the people as individuals.

Judgment reserved.

June 12.

THE LORD CHANCELLOR. — I must confess that when I first read from the short-hand writer's notes the judgment of the Vice-Chancellor in this case, serious doubts entered my mind whether it could be supported. The injunction appears to be ordered with a view "to prevent an injury of a public kind to what the plaintiff asserts to be his legal rights, claimed by him as the acknowledged possessor of the sovereign power in a foreign state at peace with this kingdom." The printed paper manufactured by the defendants, * "purporting to represent public paper money * 231 of Hungary," is said to be intended "to be circulated at

(a) 7 Ves. 3, 21.

(b) 4 K. & J. 650.

some future time as the public paper money of Hungary, in exercise of some contemplated power hostile to that of the plaintiff and intended to supersede it." The question is stated to be "whether the defendants can be allowed to continue in possession of this large quantity of printed paper, manufactured and held by them for such a purpose? or whether the plaintiff has the right which he claims to be protected against the invasion of the defendants, and to have delivered up to him what has been thus prepared and made ready to be used for a purpose hostile to his existing right?" His Honor goes on to observe that "the regulation of the coin and currency of every state is a great prerogative right of the sovereign power, recognized and protected by the law of nations, and to be recognized as a legal right, because the law of nations is part of the common law of England." He adds that "the manufactured paper in the possession of the defendants ready to be used for a purpose adverse to the existing right of the plaintiff, and being made for no other purpose, and not being capable of being used for any other purpose, except one hostile to the sovereign rights of the plaintiff; and not being property of a kind which, like warlike weapons, may be lawfully used for other purposes, if the Court were to refuse its interference, the refusal would amount to a decision that it has no jurisdiction to protect the legal right of the plaintiff." The Vice-Chancellor seems to grant the injunction as a protection of the prerogatives of the plaintiff as King of Hungary, and to have chief regard to the allegation in the plaintiff's bill, that the notes were to be used in Hungary "in violation of the rights and prerogative of the plaintiff as King of that country, for the promotion of revolution and disorder there." The notes are supposed to differ from

* 232 "warlike weapons" only in this, *that warlike weapons may be lawfully used for legitimate purposes; whereas the notes can only be used in hostility to the rights of the plaintiff as King of Hungary, leading to the inference that if there were clear proof of "munitions of war" being manufactured and kept in this country for the express purpose of fitting out a warlike expedition against Venice or any other part of the Austrian dominions, the Court of Chancery would grant an injunction against such a use of them, and would order them to be delivered up to be destroyed.

However, in arguing the appeal in this Court, the counsel for
[182]

the plaintiff have entirely repudiated any claim to the injunction on the ground of a mere invasion of any prerogative of the plaintiff as a reigning sovereign, or of the notes being to be used to effect a revolution, or for any political purpose; and they have very freely admitted that this Court has no jurisdiction to interfere merely with a view to prevent revolution, and that it is only to prevent an injury to property that in a case like this its aid by injunction can be invoked.

The appellants first contend that the bill is demurrable, making no case for the relief sought, even if its allegations be admitted to be true. But on this point I can entertain no doubt; for discarding all that the bill says about "revolution" and "hostility to the rights of the plaintiff as sovereign of Hungary," it alleges (what perhaps might have been assumed) that he has the privilege of authorizing the issue in Hungary of notes for payment of money to be circulated in that country as money; that the circulation of Hungary consists of notes of the national bank of Austria, issued under his authority as Emperor of Austria and King of Hungary; that the defendants have prepared notes exceeding in amount one hundred millions of florins, which, although * not imitating or meant to resemble the notes of the bank * 238 of Austria, profess to be notes of the kingdom of Hungary and guaranteed by the state, and to be signed, in the name of the Hungarian nation, by the defendant Louis Kossuth; that he intends as soon as he receives these spurious notes to send them to Hungary and to introduce them into circulation there, and that "the introduction of the said notes into Hungary will create a spurious circulation there and thereby cause great detriment to the state and to the subjects of the plaintiff.

Now I am clearly of opinion that the plaintiff here states unlawful acts and intentions of the defendants, by which, if not prevented, a damage will be done to the property of the plaintiff as sovereign, and to the property of his subjects whom he has a right to represent in an English Court of justice.

I am next to consider how far these allegations are substantiated by evidence. We have an admission that the plaintiff is *de facto* Emperor of Austria and King of Hungary; that as such he has been recognized by Queen Victoria, our gracious sovereign, and that as such he has now an ambassador accredited and received at her court. The objections to his title may be canvassed in the

Diet at Pesth, but they cannot be listened to in an English Court of justice. We are not at liberty to inquire into the pretended superior title of his father or of the late emperor, said to be still alive. If the present Emperor of the French were suing here as a plaintiff, should we permit any claim to the sovereignty of France to be made on behalf of the Comte de Chambord or of the Comte de Paris, or suffer any inquiry into the *coup d'état*, by which the republic was overturned in 1851, or the fairness of the subsequent election of his imperial majesty by universal suffrage?

* 234 * The right of issuing notes for payment of money, as part of the circulating medium in Hungary, seems to follow from the *jus cudendæ monetæ* belonging to the supreme power in every state. This right is not confined to the issue of portions of the precious metals, of intrinsic value according to their weight and fineness, but under it portions of the coarser metals or of other substances may be made to represent varying amounts in value of gold and silver, for which they may pass current. It is in evidence that the national bank of Austria, by the authority of the Emperor, does issue notes which form the circulating medium of Hungary, and that from this arrangement a profit accrues to the Emperor. Objection is made that in Hungary it is unlawful or unconstitutional to issue such notes to pass as money and to be a legal tender, without the authority of the Diet; but they might pass as money without being a legal tender, and as *de facto* they are a legal tender according to the law administered in Hungary, we can hardly inquire in an English Court of justice as to whether this is a stretch of prerogative. I do not feel justified in following the advice of M. Kossuth's counsel, that this Court should punish the Emperor of Austria for his arbitrary rule, by refusing the protection which he solicits for the monetary property of himself and his subjects in Hungary. If any complaint should be made in a foreign Court of justice of an injury to our currency, consisting of Bank of England notes, we should hardly expect to be nonsuited on account of an alleged overissue contrary to Sir Robert Peel's Act, or of an Order in Council having issued, by a stretch of prerogative, to suspend cash payments.

The manufacturing of these notes by the defendants Messrs. Day for the defendant M. Kossuth, to the enormous amount of

* 235 one hundred millions of florins, is * not disputed. They are (as the bill describes them) in the Hungarian languages,

they have on their borders in German and also in the Slavonian and other languages the amount which they purport to represent, and bear upon them an impression of the royal arms of Hungary. The following is a literal translation of one of them : —

“ One florin.

“ This monetary note will be received in every Hungarian state and public pay office as

“ One florin in silver.

“ Three zwanzigers being one florin, and its whole nominal value is guaranteed by the state.

“ In the name of the nation.

“ KOSSUTH, LOUIS.”

The note is thus declared to be of the value of one florin in silver, and there is an assurance that it will be received for this amount in every Hungarian state and public pay office, and that its whole nominal value is guaranteed by the state. Finally, it is signed by Louis Kossuth, the defendant, “ in the name of the nation,”— he thus declaring that he has the authority of the nation so to sign it, and to give the guarantee.

A remarkable circumstance respecting the note is, that although perfected and ready for issue and circulation, it bears no date, and there is no sign or intimation of an intention to inscribe any date upon it.

Let us now take M. Kossuth's own statement in his affidavit of the use he means to make of these notes. After asserting “ that the plaintiff in this suit is not and never has been King of Hungary, either *de jure* or *de facto*,” he declares “ that he himself never has attempted nor had intention to attempt to introduce the said notes, * falsely in the said bill called spurious notes, * 236 into Hungary so long as the present condition of forcible dominion exists there : what the plaintiff calls revolution, but which will in fact be the restoration of the laws and rights of Hungary, must itself have happened in Hungary before the notes in the said bill named can acquire the value of which the plaintiff expresses so much fear through that circulation in the kingdom of Hungary.”

This answer to the charge of an intention to use the notes with a view to injure and depreciate the present currency of Hungary only amounts to a declaration that M. Kossuth will not attempt to

introduce them into Hungary till an opportunity occurs of being able to do so with effect. The "revolution" or "restoration" must be complete "before they have acquired their full value." But M. Kossuth, whom I consider as a man of honour as well as a man of extraordinary talents and accomplishments, does not deny that as soon as the opportunity offered, he would pour these notes into any part of Hungary where they could be introduced. As soon as they were introduced the existing currency would cease to circulate and would become of no value. He may well consider this attempt laudable, if he be actuated by a desire to re-establish the ancient constitution of Hungary, not to gratify any object of personal ambition or vengeance; but I must say that in an English Court of justice, the manufacturing in England of such notes for such a purpose by him and his associates, I think cannot be defended. M. Kossuth, now an exile in this country, and having *de facto* no authority in Hungary, while a sovereign *de facto*, Francis Joseph, reigns there, the ally of Queen Victoria, a sovereign to whom, while residing in England, M. Kossuth owes temporary allegiance, takes upon himself to affirm that this monetary note will be received in every Hungarian state and public

* 237 * pay office; that its whole nominal value is guaranteed by the state, and that he, Louis Kossuth, has authority to sign it in the name of the Hungarian nation. Can it reasonably be doubted that this was meant to be a rival to the present currency in Hungary, wherever it could be brought into competition with it, and that as the new currency gained credit the old would cease to be of any commercial value? Thus, if the acts meditated by the defendants and forbidden by this injunction were actually done, a pecuniary loss would be sustained by the plaintiff and by all his subjects, holders of the existing currency. It seems to me idle to say that many tons of these notes would be kept in warehouses without bulk being broken, till the wished-for revolution or restoration had become an accomplished fact, and, the existing currency having vanished, room would be made for the introduction of the new currency without prejudice to sovereign or subject. The depreciation or destruction of the existing currency in Hungary, I believe, upon the evidence, to have been an object aimed at by M. Kossuth and those associated with him. The defendants, the Messrs. Day, are allowed to be very respectable tradesmen, but they do not deny the allegation in the 8th paragraph of the bill,

that, "before they prepared the plates for the said documents, they were aware of the purpose for which the said Louis Kossuth intended to use the same, and that he was not authorized by the plaintiff to prepare or issue the same, and that the said documents were in violation of the rights of the plaintiff as King of Hungary."

I will now consider the objections to the decree appealed against, which appear to me to be chiefly relied upon by the appellant's counsel in the very learned and very able arguments which we have had the advantage of hearing from them.

* In the first place, they deny the right of the plaintiff as * 238 a sovereign prince to maintain this suit, and if the suit were instituted merely to support his political power and prerogatives, or for any alleged wrong sanctioned by the government of England, I should acquiesce in that position. But the *King of Spain v. Hullett*, *The King of the Two Sicilies v. Willcox*, and various other authorities show that by the law of England a foreign sovereign may sue in our Courts for a wrong done to him by an English subject unauthorized by the English government, in respect of property belonging to the foreign sovereign, either in his individual or in his corporate capacity.

Then comes the great question, whether this is a subject over which the Court of Chancery has jurisdiction by injunction?

Notwithstanding my sincere respect for the authority of that great America jurist, Justice STORY, I cannot concur with him in his recommendation of a mysterious obscurity to be preserved by Courts of Equity respecting special injunctions, and the caution which should make them "decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions should be granted or withheld." I think that all branches of the law should, if possible, be made clear and simple, and should be defined as accurately as possible. I have no hesitation in saying that Lord MACCLESFIELD was wrong when he laid down in *Burnett v. Chetwood*, that "the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality." So I have no hesitation in saying that Lord ELLENBOROUGH was wrong when he laid down in *Dubost v. Beresford* that * "the Lord Chancellor would grant an injunction * 239 against the exhibition of a libellous picture."

For this language I have the high authority of Lord ELDON, who

in *Gee v. Pritchard*, (a) upon the question of granting an injunction against the publication of a libel said, "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes;" adding, what is most pertinent to the present case, "the question will be whether the bill has stated facts of which the Court can take notice as a case of civil property which it is bound to protect."¹

Again, the same great Judge in the same case of *Gee v. Pritchard*, with reference to the question, whether there can be property in a letter written to a friend, after admitting that, if the question had then arisen for the first time, he should have found it difficult to satisfy his mind that there was a property in the letter, goes on to say, "but it is my duty to submit my judgment to the authority of those who had gone before me. The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case."² I cannot agree that the doctrines of this Court are to be changed with every succeeding Judge. Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot." The recommendation of mystery and obscurity in treating of judicial jurisdiction is only fit for the Star Chamber, which was called "a Court of Criminal Equity."

* 240 * I consider that this Court has jurisdiction by injunction to protect property from an act threatened, which if completed would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party

(a) 2 Swanst. 414.

¹ In *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 558, 559, Sir R. MALINS V. C. said: "The jurisdiction of this Court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation." "The truth, I apprehend, is that the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property. That was the principle on which the court restrained the proceedings of *M. Kossuth*, with regard to the Hungarian notes in the case of the Emperor of Austria *v. Day*." See *Macaulay v. Shackell*, 1 Bligh N. S. 96, 127; 2 Dan. Ch. Pr. (4th Am. ed.) 1648; *Kerr Inj.* 1, 2.

² See *Kerr Inj.* 4; *Bond v. Hopkins*, 1 Sch. & Lef. 429.

applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted.

Although an action arising purely *ex delicto* for an injury to property may not have been brought by a foreign sovereign against an English subject in an English Court, on principle I cannot doubt that such action would be maintainable. If the bank of Austria were actually damaged by the unlawful importation from England into Hungary of spurious notes intended to discredit the notes of the bank of Austria, I apprehend that the bank of Austria might maintain an action in England against the wrong-doers. The case of the *Bank of England v. Anderson* may be considered an authority that the bank of Austria might maintain an action and be entitled to an injunction under such circumstances. If the bank of Austria might, why may not the King of Hungary, on proof that by the same wrong a pecuniary damage has been sustained by him?

The case of *Sir James Clark v. Freeman* is cited as an authority against an injunction for a wrong which produces pecuniary damage. There Lord LANGDALE refused an application by a very distinguished physician for an injunction against the wrongful publication of advertisements falsely imputing to him that he sold and recommended quack medicines, in a manner tending to injure his practice and profits. But the injunction was refused only on the ground that the plaintiff did not * make out that any * 241 pecuniary loss would accrue to him from the publication; and Lord LANGDALE said, "The granting the injunction in this case would imply that the Court has jurisdiction to stay the publication of a libel."¹ For the same reason, in *Martin v. Wright*, an injunction was refused to Mr. Martin, the celebrated artist who

¹ In *Maxwell v. Hogg*, L. R. 2 Ch. Ap. 307, 310, Lord CAIRNS said: "It always appeared to me that *Clark v. Freeman* might have been decided in favour of the plaintiff, on the ground that he had a property in his own name." Referring to the decision of Lord LANGDALE in *Clark v. Freeman*, Sir R. MALINS V. C. said: "I confess myself wholly unable to coincide in the reasoning of Lord LANGDALE in that case, and the decision may now, I think, be considered as erroneous for the reasons stated by Lord CAIRNS in *Maxwell v. Hogg*." *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 561. See also the remarks of the same Judge upon the case of *Clark v. Freeman*, in *Dixon v. Holden*, L. R. 7 Eq. 493.

painted Belshazzar's Feast, against the exhibition of a copy of it on a greatly enlarged scale, with dioramic effect, and advertised as "Mr. Martin's grand picture of Belshazzar's Feast." The Vice-Chancellor SHADWELL there observed, "The copy represented as Martin's picture must be either better or worse: if it is better, Martin has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and the Court will not prevent the publication of a libel:" adding, "if Martin had exhibited his picture as a diorama, then he might have been entitled to an injunction." Pecuniary damage, therefore, in such cases is always made the criterion.¹

Great reliance was placed by the appellant's counsel on the decision of the House of Lords in *Jeffery v. Boosey*, reversing an unanimous decision of the Court of Exchequer Chamber, in which I had concurred. That high tribunal must of course be considered as having decided rightly, but the *ratio decidendi* was merely that an absolute assignment executed abroad of all an author's copyright in a musical composition gave no title to the assignee beyond the territory of the state in which the assignment was executed, and this is no authority for saying that the assignee could not have maintained an action in England for an injury to the copyright within the limits of that territory.

A more specious objection was rested on the class of cases * 242 in which it has been held that we take no notice * of the "revenue laws" of foreign countries, so that an injunction would certainly be refused to a foreign sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, "revenue laws" have always been made the exception; and this may be an example of an exception proving the rule. The prohibition by the government of China of the importation of opium, on the alleged ground of public morals, was likewise mentioned; but the English government refused to interfere with this trade, consider-

¹ In *Dixon v. Holden*, L. R. 7 Eq. 488, it was held that the Court of Chancery has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired; and on that ground the publication of a notice stating that the plaintiff was a partner in a bankrupt firm was restrained.

ing that the Chinese prohibition was rather with a view to revenue, or for the protection of the native culture of the poppy.

Last of all, we were told that as his holiness the Pope, being a temporal sovereign, has an *index expurgatorius*, including a translation of the Holy Scriptures; if he were to make it penal to import into Civita Vecchia any of the books in this index (which would clearly be within the scope of his lawful authority), according to the doctrine contended for by the Emperor of Austria, his holiness might apply for an injunction against the exportation from this country of a cargo destined for his dominions consisting of volumes which we revere as most sacred. But as to foreign laws which we are to respect, there has ever been an exception of foreign laws in conflict with our own laws on subjects of religion and morality. In this last case it could hardly be alleged that any injury to property, or any pecuniary loss, could come in question.

Before concluding, I ought to mention that my opinion in favour of the decree does not by any means depend * upon * 248 the supposed analogy between this case and the prosecution of Peltier for libelling the Emperor Napoleon, or the prosecution of Lord George Gordon for libelling Marie Antoinette. Nor do I think that *Farina v. Silverlock*, or any of the trade-mark cases, can be rendered available; for here, instead of there being any attempt at simulation, the object is clearly disclosed to make a contrast between Kossuth's notes and those of the Emperor of Austria. For the same reason, the Acts of Parliament against forging the paper securities of foreign governments do not assist us.

I must likewise observe, with great deference to some remarks which were made during the argument, that I do not think that any importance is to be attached to the fact that M. Kossuth had actually been finance minister of Hungary at a prior period; for not only is the plaintiff's bill entirely silent on this subject, whereas it ought to have charged the fact, if reliance was to be placed on his continuing to act in that capacity when his authority to do so had expired, but there seems to me to be no ground whatever for imputing fraud to him on this score; and no one in Hungary can be supposed to give credit to the notes on the supposition that they were issued with the authority of the Emperor of Austria. Therefore the case of *Routh v. Webster*, (a) in which an injunction was

(a) 10 Beav. 561.

granted against advertisements falsely representing the plaintiff to be director of a joint-stock company, does not seem to me to apply.

But I repeat that I place much reliance on the fact that the defendant Kossuth by these notes asserts that they are guaranteed by the state, and that he had authority to sign them in the name of the Hungarian nation.

* 244 * It is very satisfactory to me to think that if this decree is affirmed there is no danger of this country losing the credit which it has long enjoyed of being an asylum for those who, from persecution or revolution, have been driven for a time from their native land. They enjoy this asylum on the condition that while resident in England they enter into no conspiracies or plots against existing governments in foreign states which would be an infraction of our municipal law by native-born subjects. Fitting out a warlike expedition in England to bring about a revolution in the dominions of a sovereign in alliance with Queen Victoria would certainly amount to a misdemeanour, be the confederates native-born subjects or aliens, and the manufacture of twenty tons of promissory notes for the same purpose may amount to the same offence. Therefore I can consider M. Kossuth no more an object of pity, if by an injunction he receives a check in this enterprise, than the Emperor Louis Napoleon would have been, if by a criminal prosecution he had been stopped in his enterprise when he was about to sail from the Thames for Boulogne, with a view to dethrone Louis Philippe.

Our sympathy has been powerfully appealed to in favour of the Messrs. Day, if their plates for printing Hungarian notes should be defaced and all the Hungarian notes they have manufactured should be damasked, and, instead of circulating at Presburg, Pesth, and Buda, should be consigned to the use of the grocer and the trunkmaker in London, the manufacturers having a very dubious remedy by action against M. Kossuth for their work, labour, and materials. But they must have been aware that there was some considerable risk in the gigantic speculation in which they embarked; and as they no doubt would have derived much profit as well as fame, if Hungary had been revolutionized by their

* 245 * means, they must console themselves with the reflection that they have failed in a great enterprise, and that their fate holds out a lesson to other tradesmen to be contented with

the gains and reputation to be earned in the ordinary occupations of their calling, however sober and commonplace these may be.

I rather think that the decree ought to be varied with respect to prohibiting M. Kossuth from the use of the royal arms of Hungary; for it would appear that they may be innocently used by all Hungarians, and, I presume, by all mankind.

With this variation, I am of opinion that the decree appealed against ought to be affirmed, and that the appeal must be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the material facts are substantially undisputed. There has been some controversy as to immaterial facts, which may be passed over. The question of law mainly, if not solely, raised has been whether the actual reigning sovereign of a foreign state in amity with Great Britain can sue in this Court for the purpose of preventing the exportation from England of notes for money, which, professing to be issued by the authority of that foreign nation, and to be in effect its paper money, but having had no sanction from its actual government, have been manufactured here with the intention of exporting them from hence at some future possible time, or on the happening of some contingent event, for circulation and use in that country: a question which, generally put, must be capable, I suppose, of receiving, consistently with the nature of this jurisdiction and the principles that regulate the intercourse and relations between civilized nations on friendly terms together, only * an affirmative answer. There may however be special * 246 circumstances excluding or displacing the right of suit *prima facie* existing. Are there such before us?

The plaintiff is, and during all the time material for us now to consider has been, the actually reigning sovereign of the kingdom of Hungary, and recognized by the sovereign of this country and her government as the sovereign of the kingdom of Hungary. The plaintiff, as the sovereign of Hungary, is, and during the whole time has been, at peace with the British Queen and government. The two sovereigns accordingly, the two governments, the two nations, are, and during the whole time have been, on friendly terms together, and we are, I think, clearly bound to take the plaintiff and his government to have been all along and to be the lawful sovereign and lawful government of the kingdom of Hun-

gary. The acts done and intended by the defendants, which appear upon the bill and affidavits in the cause, and to which I am about to advert, have not been wholly or in part authorized, sanctioned, or approved by the plaintiff or his government. The plaintiff and his government object strongly to every portion of them. The defendants, before and when this suit was instituted, were resident in England, and therefore within the jurisdiction of the Queen's Superior Courts here, and in every sense important for any present purpose, if not in every sense whatever, her subjects. They have appeared in the suit and defended it. Their proceedings, of which complaint is made, have been thus: They have been preparing in this country for public issue in Hungary, and for practical use there, a great number of notes for various amounts of money; namely, florins or guldens, each note being, chiefly at least, in the Hungarian language. A

sufficient sample is given by translation in the 5th paragraph of the bill, and the Lord *Chancellor has stated it.

The notes are undated. They purport to be signed by a Hungarian gentleman, one of the defendants, "in the name of the nation," that is to say, "in the name of the Hungarian nation," and each note distinctly asserts that "its whole nominal value is guaranteed by the state," the word "state" there plainly meaning "the Hungarian state." We must, I repeat, hold the plaintiff to be the representative here, for every purpose now material, of the Hungarian realm and state; that is to say, of the state which the notes describe as guaranteeing their whole nominal value. And I conceive that, for every purpose at present important, his case stands on the same basis as if the notes had described their whole nominal value as guaranteed by the head of the Hungarian realm or Hungarian state, or by the executive government of the Hungarian realm or Hungarian state. We are bound to regard the plaintiff as being, and having been during all the time important now to be regarded, the head of that realm, the head of that state, the head of its executive government. That in the condition of the relations between the governments of Hungary and of Great Britain, as those relations exist and during all the time material for us to regard have existed, the preparation here without and against the plaintiff's consent of such documents as these, with the intention of issuing and using them in Hungary without and against his consent, was and is by the law of England, was and is by the

law of nations, wrongful, is, I think, manifest, though whether by the law of England or the law of nations criminal as well as wrongful I think a question not for any present purpose material. When I use the term "wrongful," I mean "civilly unlawful," as regards rights of property, that is to say, the public revenues, the fiscal resources, the pecuniary means of the realm of Hungary, which rights the plaintiff is entitled to represent here. He is, I apprehend, * entitled therefore to the protection of this * 248 Court, according to its ordinary course in analogous cases, from the infliction of such a wrong. That he is resident abroad, domiciled abroad, and a foreign potentate, cannot make any difference adverse to him; for he is an alien friend, a potentate at peace and in amity with this kingdom. It has been argued that we ought to delay or abstain from acting, because the documents in question were and are intended to be and can practically be used only in Hungary, nor at all unless the present system of government in that country shall be subverted or importantly changed. This seems to me not to improve the defendants' case. That a superior Court here is not, at the instance whether of an Englishman or of an alien friend, to interfere to prevent a civil wrong intended by persons resident here, merely because, though their preparations for the perpetration of the wrong are practically proceeding here, it is, when they shall be completed, to be carried into execution elsewhere in a friendly kingdom, seems to me a proposition plainly untenable, whether we regard principle or authority.

What the defendants have been doing is with a view to publication and public issue at some possible time, is with a view to the use of the documents at some possible time; and although the present state of affairs in Hungary may possibly continue unchanged for an incalculable length of duration, the defendants' proceedings cannot the more be viewed, I think, as just or harmless; and it would in my opinion be a discredit to our institutions and a breach of English and of international law to refuse relief to the plaintiff. We must take it to be the opinion of one at least of the defendants, and certainly it is mine, that, in the event of an attempt at subverting the present government of Hungary, a store of such documents in readiness would be of assistance to that endeavour — * a remark not in a political sense * 249 or with a political bearing material, — but possibly not un-

important with reference strictly to the proper ground on which our jurisdiction for the present purpose rests.

The notes do not purport to point merely to a future or contingent or possible liability of the "state." Their form imports present and immediate liability. They are, I repeat, undated; nor perhaps it is altogether immaterial to notice that M. Kossuth states himself to have been at a former period, under the Emperor Ferdinand when reigning King of Hungary, the finance minister of that country. The defendants, who have been manufacturing instruments not then and not at present capable of being lawfully used, nor certain to be at any time capable of lawful use, but which were then and are now capable of being unlawfully used, claim credit for intending to use them only when, if ever, they shall be able lawfully to use them. That credit I consider them not warranted in claiming from a Court of justice, which will not trust to promises of peace and prudence made by the framers and bearers of unlawful weapons. The Vice-Chancellor held the plaintiff entitled in terms, or substantially, to the relief prayed by the bill, and I also think him so entitled, at least, in the main. The language of the prayer and decree is, probably, with respect to the armorial bearings of Hungary, too extensive, as the Lord Chancellor has stated; and so, indeed, it seems to have been agreed at the bar.

That small matter will be provided for; and the cancellation or destruction should be, I suppose, as directed by the Vice-Chancellor. Costs, down to the hearing before that learned Judge, were waived, I believe, in his Court by the plaintiff's counsel.

That waiver had probably better appear on the record. The
 * 250 defendants * ought, I think, to be ordered to pay the costs of the appeals, unless the plaintiff shall also waive them.

THE LORD JUSTICE TURNER. — I have but little to add in this case. This bill, as I read it, puts the plaintiff's case upon three grounds: 1st. Violation of the rights and prerogative of the plaintiff as King of Hungary, by the promotion of revolution and disorder, and otherwise, — 2d. Injury to the state of Hungary, by the introduction of a spurious circulation into that kingdom. And 3d. Injury to the subjects of the plaintiff, by the same cause. The charges of the bill in these respects are that the defendant Kossuth intends to use the notes in question in violation of the rights and

prerogative of the plaintiff as King of Hungary, and, amongst other purposes, for the promotion of revolution and disorder there, and that the introduction of the notes into Hungary will create a spurious circulation in that country, and by that and other means cause great detriment to the state and to the subjects of the plaintiff.

That this Court has no jurisdiction to interfere upon the ground that the notes in question are intended to be used for the purpose of promoting revolution and disorder in the kingdom of Hungary was freely conceded at the bar by the plaintiff's counsel, and can admit of no doubt. This view of the case, therefore, may be laid out of consideration. It was urged, however, on the part of the defendants, that the prevention of revolutionary designs was the main if not the sole object of this bill, and that the Court ought, upon that ground, to have refused its interference, but we can know nothing of what is passing or may be intended in Hungary, except what is judicially before us; and if the bill states other grounds affording * title to relief, we are bound, * 251 as I apprehend, to pay attention to those grounds.

This brings us to the question, whether the infringement of the prerogative rights of a foreign sovereign constitutes a ground of suit in this Court. The case was very much argued upon this point. It was urged for the plaintiff that the right of coining money, the *jus cudendæ monetæ*, was universally acknowledged to be a prerogative of sovereigns, vested in them for the benefit of their subjects; that this prerogative right extended no less to the creation of paper money than to the stamping of coin; that it was acknowledged by all nations and recognized by international law; and that, international law being part of the law of England, this Court would interfere in favour of the rights recognized by and founded upon it. That the right of coining money is the prerogative of a sovereign is laid down by all the writers on international law, and I see no reason to doubt that the prerogative right reaches to the issue of paper money. Burlamaqui, (a) indeed, mentions and treats of it as so extending. To this extent, therefore, I agree with the argument on the part of the plaintiff, but the argument failed to satisfy my mind that this Court can or ought to interfere in aid of the prerogatives of a foreign sovereign. The prerogative rights of sovereigns seem to me, as at present advised, to stand

(a) Vol. 3, p. 241.

very much upon the same footing as acts of state and matters of that description, with which the municipal Courts of this country do not and cannot interfere. Such acts and matters are recognized by international law no less than the prerogative rights of sovereigns; but the municipal Courts of this country have disclaimed all right to interfere with respect to them. If the subject

* 252 of one state * infringes the prerogative of the sovereign of another state, the remedy, as I apprehend, lies in an appeal by the offended sovereign to the sovereign of the state to which the offender belongs, and if redress be unjustly refused, the refusal may, as I apprehend, even be made the ground of war. This, I think, may be gathered from Vattel, and it seems to me important to be adhered to; for the prerogative of peace and war belongs to the sovereign of every state, and it can hardly be denied that the interference of the municipal Courts in such matters may tend very much to embarrass if not to fetter the free exercise of these latter prerogatives. The same reasoning which applies to the prerogative rights of sovereigns seems to me to apply also to the political rights of nations; and so far, therefore, as this bill is founded upon the prerogative rights of the plaintiff, or upon the political rights of his subjects, my present opinion, speaking with all respect of what fell from the Vice-Chancellor in the course of his judgment, is against the decree which he has made.

The conclusion to which I have come in this case does not, however, depend upon these points; and I do not think it necessary, therefore, to enter more fully into them, or into the arguments bearing upon them; nor do I wish to be understood as giving any final opinion upon them. This case, as it seems to me, may and ought to be decided upon the third ground on which the case is rested by the bill, — the injury to the subjects of the plaintiff by the introduction of a spurious circulation. I take it to be now well settled, although upon looking into the authorities I have been surprised to find that the point was doubted even in the time of

LORD LOUGHBOROUGH, (a) that a foreign sovereign may sue * 253 in the * Courts of this country, and that he may sue in this Court on the behalf of his subjects; and this bill, if it does not require, certainly admits the construction, that it is filed by the plaintiff in his representative character on behalf of the subjects of

(a) 3 Ves. 431.

his kingdom, for it distinctly alleges a case of injury to them. We must consider, then, what is the nature of this injury. I think it is an injury not to the political but to the private rights of the plaintiff's subjects. What is proposed to be done is to introduce into the kingdom of Hungary an enormous number of notes which, on the face of them, purport that they will be received in the public offices of the state and that they are guaranteed by the state, and which purport also to be signed in the name of the nation by the defendant Louis Kossuth. That the effect of this introduction will be to disturb the circulation of the kingdom cannot, in my opinion, be doubted; and what will be the effect of that disturbance? Surely to endanger, to prejudice, and to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of Austrian bank-notes, and indirectly, if not directly, all the holders of property in the state. The same great authority to which I have referred has very clearly pointed out these consequences. (a) But it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property,¹ but I think there are here rights of property quite sufficient * to found jurisdiction in this Court. I do * 254 not agree to the proposition, that there is no remedy in this Court if there be no remedy at law,² and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this Court, Lord REDESDALE, in his Treatise on Pleading, in enumerating the cases to which the jurisdiction of the Court extends, mentions cases of this class. — "Where the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent." It is plain, therefore, that, in the opinion of Lord REDESDALE, who was pre-eminently distinguished for his knowledge of the

(a) Vattel, book 1, c. 10.

¹ See *ante*, 239 note; Kerr Inj. 1.

² See Kerr Inj. 198.

principles of this Court, the jurisdiction of the Court is not limited to cases in which there is a right at law. There is, indeed, a familiar instance in which the jurisdiction is not so limited,—the cases of waste. In some cases of waste there was no right and no remedy at law, but this Court did not on that ground refuse its interference. I do not refer to the case of equitable waste, which, however, is another instance, but to the cases in which there was an intervening legal estate. To say that the jurisdiction of this Court is limited only by the principles of universal justice would no doubt be going too far, and I must not be understood so to construe what Lord REDESDALE has said. I take the passage to refer to cases in which there is what the law in principle acknowledges to be a wrong, but as to which it gives no remedy, as in the case of waste to which I have referred. The case before us may, I think, well be tried by this rule. If the property of an individual is affected by an undue and unauthorized use of his name, the law would no doubt give a remedy.¹ I am not satisfied that the law would not give

* 255 the same remedy in the case of * the undue and unauthorized use of the name of a nation or state; but whether it would do so or not, and if not, whether it would be prevented from doing so by the absence of positive law or by mere formal impediments as to the right to sue, I think the authority to which I have referred, and the instance which I have mentioned of the application of it, warrant me in saying that the case falls within the jurisdiction of this Court. It was said, on the part of the defendants, that the Court has only interfered in cases of this nature where there was a right at law, or where there was trust or confidence; but if the jurisdiction exists, the extent of it cannot be limited by the instances in which it has been applied. It was also attempted to be argued on the part of the defendants, that, assuming the existence of the jurisdiction, there was no sufficient case for the exercise of it. But upon this point I have felt no doubt. The jurisdiction of this Court is preventive as well as remedial, and the affidavit of the defendant Kossuth himself quite satisfies my mind that there is a proper case for the exercise of it. Subject, therefore, to the qualification to which the Lord Chancellor has adverted, I think that this decree must stand.

¹ See *ante*, 241 note.

* CASE v. JAMES.

* 256

1861. May 8. June 12. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

C. and T. were trustees of a will. T. was also the sole trustee of a settlement wholly unconnected with the will. T. had misappropriated a sum of stock, part of the settlement fund. The *cestuis que trust*, who had been informed by him that it had been invested on mortgage, pressed him to replace it. He thereupon induced C. to concur in transferring into the sole name of him, T., a like sum of stock, part of the trust funds under the will, and executed to C. a transfer of a mortgage in fee for securing the amount. He then informed the *cestuis que trust* under the settlement that their fund was properly invested in stock in his name, and they thereupon placed a *distringas* upon the fund which had been transferred to him as above. They had no notice that the stock did not arise from an investment of their own trust funds. T. afterwards died insolvent, and it was then discovered that the mortgage deed was a forgery. The stock being still in the name of T., C. filed a bill against the *cestuis que trust* under the settlement, to obtain a transfer to himself of the stock, on the ground that it still belonged to the funds under the will.

Held by the Lord Chancellor and the Lord Justice KNIGHT BRUCE, that however the case might have stood if the *cestuis que trust* under the will had been the plaintiffs (as to which their lordships gave no opinion), C. could not claim to have the fund retransferred.¹

Per the Lord Justice TURNER, *quære*, whether the trust in favour of the persons entitled under the will could be defeated while the stock remained standing in T.'s name, and he continued to be a trustee of the will; and *quære*, whether C., in his character of trustee, was not entitled to maintain a suit to have this trust enforced, though he had been guilty of a breach of trust in concurring in the transfer to T.

THIS was an appeal by the plaintiff from an order of the Master of the Rolls dismissing his bill.

Samuel Turnley died in 1854, leaving a will by which he gave his residuary estate to the plaintiff and Frederick Tritton, upon trust to invest in government or real securities, which were to be held on trusts which it is unnecessary to specify. In May, 1858, there was standing in the testator's name a sum of 2225*l.* new 3*l.* per cent annuities which had belonged to the testator, and had not been

¹ See 2 Dart V. & P. (4th Eng. ed.) 756, 757; Perry Trusts, §§ 218, 828; Lewin Trusts (5th Eng. ed.), 616.

transferred into any other name, and there was also a sum of 175*l.* like annuities, standing in the names of the two trustees.

Tritton was at the same time the sole trustee under a deed * 257 of the 19th of June, 1845, relating to property of a * Mr.

Charles Sayer, which was thereby settled upon trusts for Mrs. James and her children. In or before the early part of the year 1857, Tritton had sold out 2483*l.* 16*s.* 7*d.* new 3*l.* per cent annuities belonging to this settlement and applied the proceeds to his own purposes. In 1857, some of the persons beneficially interested began to make inquiries as to the investment of the trust funds, and a long correspondence ensued between them and Tritton on the subject, in the course of which Tritton represented that the fund was invested on a mortgage of the 1st of January, 1855, which he produced. Mr. Carpenter, who acted on behalf of some of the parties beneficially interested, repeatedly insisted that the proper amount of new 3*l.* per cent stock should be replaced, and continued to press Tritton to restore the fund to its original state.

In 1858, Tritton informed the plaintiff that he had a mortgage which would afford a beneficial investment for the Turnley funds, being a mortgage in fee to himself of real estate belonging to a Mrs. Stapleton, and proposed to execute a sub-mortgage to the plaintiff alone, as a security. The plaintiff, relying on the advice of Tritton, who was a solicitor, assented, and in May, 1858, the two sums of 2225*l.* and 175*l.* stock were transferred into the sole name of Tritton, and he executed to the plaintiff a transfer of the mortgage of the 1st of January, 1855, and handed it and the original mortgage to the plaintiff.

A few days after this, Tritton procured from some other source a transfer into his own name of a further sum of 83*l.* 16*s.* 7*d.* new 3*l.* per cents, thus making up the 2483*l.* 16*s.* 7*d.* which he owed to Sayer's trust, and on the 25th of May, 1858, he wrote and sent to Mr. Carpenter the following letter:—

* 258 * “James's trust: I have invested this money in the purchase of the sum of 2483*l.* 16*s.* 7*d.* stock in the new 3*l.* per cents, that being the stock in which it was originally placed. It stands in the name of Frederick Tritton, of Bridge House Place, Newington Causeway, Esq.”

On the 17th of June, 1858, those of the *cestuis que trust* under

Sayer's settlement for whom Mr. Carpenter acted placed a *distringas* upon this sum of stock. It was not alleged that they had any notice that any part of it belonged to Turnley's trust.

On the 22d November, 1859, Tritton died insolvent, and it was afterwards discovered that the mortgage from Mrs. Stapleton was a forgery. The 2483*l.* 16*s.* 7*d.* stock was still standing in the name of Tritton, to whom administration had not been taken out. The plaintiff then filed his bill against the persons entitled under Sayer's settlement, to procure a transfer to himself of 2400*l.*, part of this sum of stock, on the ground that it had never ceased to belong to Turnley's estate. A representative to Tritton was appointed in the suit. The Master of the Rolls dismissed the bill, (a) and the plaintiff appealed.

Mr. Roundell Palmer and *Mr. Law*, for the appellant. — The stock clearly belonged to Turnley's trust, and the *onus* is on the defendants to displace this earlier equity. The prior equity must prevail, unless there has been conduct on the part of the prior equitable owner to displace him; *Manninford v. Toleman*. (b) Here nothing is alleged against the *cestuis que trust* under Turnley's will, they * were strangers to the whole transaction. * 259 Tritton could not, by his letter of May, 1858, make himself a trustee of Turnley's stock for the Jameses. He had no equitable interest in him, and how could he by a mere declaration confer one upon another person? A trustee for A. cannot by a declaration make himself trustee for B. so as to exclude A.'s title. *Bridgett v. Hames*, (c) *Livesey v. Harding*, (d) *Brearclyff v. Dorrington*. (e) The Master of the Rolls went on the authority of *Thorndike v. Hunt*, (g) but in that case the legal title was transferred, so that the legal estate was vested in trustees who had no privity with the original owners, and the defence of a purchase for value without notice was good, the fund being, to all intents and purposes in the possession of the persons for whose benefit it had been transferred. Here, on the contrary, the fund never got out of the hands of Tritton, who was throughout a trustee of Turnley's will; his possession was the possession of his *cestuis que trust* under that will, and the circumstances do not arise under which the

(a) 29 Beav. 512.

(d) 23 Beav. 141.

(b) 1 Coll. 670.

(e) 4 De G. & Sm. 122.

(c) 1 Coll. 72.

(g) 3 De G. & J. 563.

defence of a purchase for value without notice can be made available. *Colyer v. Finch.* (a)

Mr. Selwyn and *Mr. Southgate*, for the respondents. — The whole mischief in this case has arisen from the negligence of the plaintiff, and he is coming here to make us, who are in no default whatever, suffer for his gross carelessness. We contend that what took place in May, 1858, amounted in substance to a transfer to us for valuable consideration without notice. We used all diligence to keep our fund safe, and we had no notice of the title under Turnley's will. Suppose there had been a transfer * 260 from Case and Tritton to a stranger, and then * a transfer from the stranger to Tritton, would not the right of the *cestuis que trust* under Turnley's will have been destroyed, and what difference in substance does it make that there was no such circuitry, the stock having become vested for value in a trustee for us ?

[THE LORD JUSTICE TURNER. — Does it make no difference that this trustee for you knew that the stock belonged to Turnley's legatees ?]

No ; we dealt with him for value without notice, and his declaration of trust for us under such circumstances is just the same as a transfer to a new trustee for us. *Thorndike v. Hunt* applies. In that case the unsuccessful party urged, that one of the trustees to whom the transfer was made being his trustee, he had never lost his hold of the stock, but that argument did not prevail. If there had been a transfer to Tritton and another as trustees of Sayer's settlement, this case would have been the same as that, and it cannot make any difference that here Tritton was the sole trustee of Sayer's settlement. The true ground of the decision in *Thorndike v. Hunt* was, purchase for value without notice, which is a good defence against a legal as well as an equitable title, so far as regards equitable relief. *Colyer v. Finch*, (a) *Joyce v. De Moleyns.* (b) The cases of *Ex parte Pye* (c) and *Kekewick v. Manning* (d) show, that what was done here would be sufficient to affix a trust on stock in favour of a volunteer, *a fortiori* in favour of a purchaser for value. The property here was vested in a trus-

(a) 5 H. L. Cas. 905.

(c) 18 Ves. 148.

(b) 2 Jo. & Lat. 374.

(d) 1 De G., M. & G. 176.

tee for us, and we acquired both the legal and equitable title ; the latter alone, if acquired for value and accompanied by possession, being a sufficient defence. Priority does not depend on mere order of time, the mortgage security was accepted on behalf of Turnley's trust, we rejected it, which makes the equities not equal. The rule " *qui prior est tempore * potior est jure,*" * 261 is subject to exceptions, as is shown in *Rice v. Rice*. (a) The trustees of Turnley's will had power to invest on mortgage, they exercised that power, and the fund was thus discharged of the original trusts.

We contend, however, that the case need not be argued on this footing. It is not the *cestuis que trust* under Turnley's will who are suing us, and the plaintiff cannot place himself in their position. As between us and him, he is the person to blame, and therefore the person primarily liable. If his *cestuis que trust* had made him repay to them the sum which he improperly placed in Tritton's sole name, he would have no right to a remedy over against us, and he has no right to come against us now. Whatever rights his *cestuis que trust* may be able to enforce against us if they choose, he has none.

Mr. Palmer, in reply.—I first treat the case on the ground taken by the Master of the Rolls, that the *cestuis que trust* under Turnley's will are to be considered as the real plaintiffs. It is urged against their right to succeed, that the trustees, having power to vary investments, exercised it, and so discharged the fund from its original trusts. This argument is unsound at every point ; the trustees had power to vary investments, but not to do what they did. In order to have a due exercise of such a power, there must be a *bonâ fide* exercise of discretion by the trustees. Here there was nothing of the kind. Lending the fund on the security of a mortgage made to one of the trustees was a clear breach of trust, and the equitable title of the *cestuis que trust* to the stock was not displaced by a disposition of it made on purpose to carry into effect this improper investment. Before May, 1858, Tritton clearly was a * trustee of this fund, and he * 262 could not become any the less a trustee of it for Turnley's legatees by its getting into his sole name through a fraud. It

never was withdrawn from the trust, having remained in his name. No answer has been given to this argument, except by reference to cases which show that the Court will not actively interfere to take away even an equitable interest from a purchaser for value without notice, but these cases do not apply where the Court is not asked to take away an interest from a purchaser, but only to ascertain and settle priorities. *Colyer v. Finch*. (a) *Thorndike v. Hunt* went on the transfer of the legal estate. The ownership of the legal estate is all-important in cases of this nature; when it is held by a trustee, the question is for whom he holds it. Here the equitable title of the *cestuis que trust*, never having been displaced by any authorized act of the trustees, cannot be treated as having been displaced at all. *Rice v. Rice* is irrelevant; the receipt in that case being a representation to all the world that the money had been paid. There is therefore no defence against the title of the *cestuis que trust* under Turnley's will.

Then I say that the trustee stands in the same position as the *cestuis que trust*, since he comes to enforce their right as being their sole trustee, which he is bound to do. A trustee cannot contract himself out of this right and duty: *Fuller v. Knight*, (b) *Baynard v. Woolley*, (c) *Franco v. Franco*; (d) which last case also shows that the trustee himself, having been cheated into a belief that he had a mortgage security, has a personal equity to have the fund replaced. This equity must prevail against the later equity of the defendants. If the fund had been in equity Case's own, how could his equity have been displaced by Tritton's
 * 263 saying that he would hold * the fund in trust for somebody else. If this suit fails it will only produce further litigation, as the *cestuis que trust* will then file a fresh bill.

Judgment reserved.

June 12.

THE LORD CHANCELLOR. — I am of opinion that in this case the bill was properly dismissed with costs.

But I by no means think that I am bound to consider, or that I ought to consider, the case as if the *cestuis que trust* under Turnley's will had been plaintiffs. Strong arguments have been

(a) 5 H. L. Cas. 905.

(c) 20 Beav. 583.

(b) 6 Beav. 205.

(d) 3 Ves. 75.

offered on opposite sides as to their right to succeed. At present I think I ought not to give any opinion whether the fund in question continues impressed with the trust in favour of these *cestuis que trust*, or whether the *cestuis que trust* under Sayer's settlement are to be considered equitably the purchasers of it for valuable consideration without notice. If I thought the rule to be universal that between contending equities the prior claim must necessarily prevail, I should not hesitate now to express my opinion as requested, so as to avoid further litigation. But to determine the question, I must consider whether the trusts out of which the contending claims arise are of the same nature, and whether there may not be circumstances in the conduct and position of the parties entitling the posterior claim to a preference.

At present the only parties before us are Case, the plaintiff, the surviving trustee under the will of Turnley, and the defendants the *cestuis que trust* under the settlement of Sayer. We are to say which of these two parties ought to succeed.

* For this purpose I have only to look to the plaintiff's * 264 own confession in the 19th paragraph of his bill, that the transaction which gives rise to this suit was "irregular and constituted a breach of trust on the part of Frederick Tritton, and of the plaintiff as the trustees of Samuel Turnley." Although Tritton is in his grave, the *cestuis que trust* under Turnley's will have a clear remedy against the plaintiff. It is allowed that he is solvent and able to indemnify them for the loss they have sustained from his breach of trust.

Notwithstanding any thing that appears, he may have already done so. The prayer of his bill is "that the said 2400*l.* 3*l.* per cent annuities (claimed by the defendants) may be ordered to be transferred into the name of the plaintiff, and that the dividends now due and to accrue due on the same bank annuities may be ordered to be paid to the plaintiff." While designated "the surviving trustee and executor of Samuel Turnley," this prayer may be for his own reimbursement.

But if the defendants the *cestuis que trust* under Sayer's settlement are deprived of this fund, they are entirely without remedy, for Tritton died insolvent.

Now, assuming the plaintiff to be free from all moral blame, and innocently to have been deceived by Tritton, on which of the two parties, the plaintiff or the defendants, ought the loss to fall?

Not only no moral blame, but no laches or incaution can be imputed to the defendants. As to the plaintiff we have *confitentem reum*.

Therefore, without considering whether *Thorndike v. Hunt* was well decided, or how far it ought to govern the case if the controversy were between the one set of *cestuis que trust* and the
 * 265 other,¹ I am of opinion that the * decree appealed against ought to be affirmed and the appeal dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE.—This appeal is from an order made at the Rolls, by which the plaintiff's bill was dismissed on the merits, with costs. The object of the suit was to establish against the defendants an equitable title asserted by the plaintiff for himself, or for the estate of Samuel Turnley, whose surviving executor he is, to a sum of 2400*l.* new 3*l.* per cent bank annuities, part of a sum of 2483*l.* 16*s.* 7*d.* new 3*l.* per cent bank annuities, which larger sum was at the end of May, 1858, has ever since been, and still is, standing in the books of the bank of England in the sole name of one Frederick Tritton, who survived Samuel Turnley, and died in the month of November, 1859, before the filing of the bill. Accordingly, were F. Tritton alive, the legal right and legal title to the whole stock would be now vested in him. But it does not appear that there is or has been any personal representative of Frederick Tritton, who seems to have died insolvent as well as intestate.

Upon the plaintiff's motion, however, an order was made in the cause, dated 5th July, 1860, by which Mr. John James Hood Lingard was appointed to represent the estate of F. Tritton for the purposes of the suit. Mr. Lingard appeared accordingly at the hearing.

From the evidence before the Court I apprehend that the plaintiff must, as between himself and Frederick Tritton, be considered to have had undoubtedly an equitable title to the 2400*l.* stock when F. Tritton died, and still to have it. The defendants, however, claim for themselves and for Thomas James (a son of the
 * 266 defendant * William James the elder), who is not a party to the suit, an equitable title to that sum, and they, as between themselves on the one hand and F. Tritton upon the

¹ See Kerr F. & M. (1st Am. ed.) §21: *Cory v. Eyre*, 1 De G., J. & S. 167.

other, undoubtedly had that title before and when he died, a title which as against Tritton has all along continued and is still in force. The plaintiff's claim is wholly adverse to the defendants and Thomas James, and whether it is better than theirs as between them and the plaintiff is the point for decision. The plaintiff's title is prior in time — it commenced earlier ; of it, however, not one of the defendants had any notice actual or constructive when, honestly so far as they were concerned and for full value, their title was acquired from F. Tritton. The controversy has arisen thus. The plaintiff and F. Tritton were the executors and trustees of the will of Samuel Turnley, which is stated in the first paragraph of the bill, and under that will held for the purposes of it a sum of 2400*l.* new 3*l.* per cent bank annuities standing in the bank books, as to the greater part in the name of Samuel Turnley, and as to the residue in the joint names of the plaintiff and F. Tritton ; both of whom in the month of May, 1858, joined in transfers which placed the whole of the 2400*l.* stock (being the 2400*l.* stock mentioned by me at the outset) in the sole name of F. Tritton, who thus acquired it by means of a gross fraud. The plaintiff, who had not, I believe, any wrong intention in the matter, seems to have concurred in the transfers under the influence of false representations made to him by F. Tritton ; but neither those representations, nor the alleged facts so represented, would if true have prevented the transfers from being, as they were, a mere and serious breach of trust as against the persons beneficially interested under Mr. Turnley's will, all of whom are absent from this record ; and who, inasmuch as the plaintiff seems personally liable to them for the 2400*l.* stock, care very possibly about the present * dispute little or nothing at all. The object of the trans- * 267
fers on the part of plaintiff as well as Tritton (however different their motives) was to place the transferred stock in the sole power of F. Tritton, so as to enable him to deal with it as his own, which he did ; for having committed another breach of trust, a breach of trust, namely, under a deed dated the 19th of June, 1845, relating to property of one Charles Sayer, and stated in the pleadings (with which property neither the plaintiff nor the estate of S. Turnley had any thing to do), and being pressed upon the subject on the part of some of those interested under the deed, to whom in consequence of that breach of trust Tritton owed more than an equal amount of stock, — owed namely 2483*l.* 16*s.* 7*d.* new

3*l.* per cent bank annuities, — he applied in making it good the 2400*l.* stock that belonged to, or had belonged to, the Turnley estate, and had been transferred into his sole name as I have said. And he did so thus: he purchased in his own name a sum of 83*l.* 16*s.* 7*d.* new 3*l.* per cent bank annuities, which, thereupon becoming added to the 2400*l.*, they made together a sum of 2483*l.* 16*s.* 7*d.* new 3*l.* per cent bank annuities standing in his sole name. That was the amount which, as I have stated, he owed to the trust under the deed of 1845. He then declared himself a trustee of the whole sum of 2483*l.* 16*s.* 7*d.* stock so standing, a trustee, that is, for the purposes of the deed under which he was originally and continued the sole trustee, and submitted to a *distringas*, protecting it on behalf of some at least of the persons interested under the deed, the defendants and Thomas James being, and having together with Mrs. King then been, the persons so interested.

Mrs. King died in 1859. The writ was lodged at the Bank of England, in June, 1858, of course therefore before the * 268 commencement of the suit. In this state of * things, the defendants' title is, I think, superior to that of the plaintiff, whose conduct in placing the 2400*l.* stock in the sole power of F. Tritton was, howsoever intended and howsoever induced, absolutely unjustifiable. In effect, he lent the 2400*l.* stock to Tritton without right and without authority, and cannot, I think, have any better grounded claim in the present litigation than if the transaction had been one of a fraudulently obtained loan to Tritton of the plaintiff's own property.

Mr. Carpenter, the agent for some at least of the defendants, was vigilant and diligent, and insisted that such an amount of stock as ought under the deed of 1845 to have been in the name of the trustee of that instrument for its purposes should be so. To this, Tritton, as I have said, submitted, and the declaration of trust mentioned in the twenty-fourth paragraph of the answer followed, as well as the *distringas*.

[His Lordship here read Tritton's letter of the 25th of May, 1858, containing the declaration of trust, the *distringas*, and the written notice which, according to the practice, had been served on the bank along with the *distringas*, requesting the bank not to allow a transfer of the stock.]

The *distringas*, with the notice to the bank, rendered a transfer of the 2400*l.* stock substantially impracticable without apprising some at least of the defendants, that sum having been parcel of the 2483*l.* 16*s.* 7*d.* stock just mentioned. The interests of Mr. and Mrs. King and Mr. and Mrs. Rolph (of whom the three survivors are among the defendants) appear from the first and second paragraphs of the answer. The defendants' mark, I think, to repeat an expression used in another case (I mean *Etty v. Bridges*), was thus set on the whole stock effectually for the present purpose, as effectually, that is to say, against the plaintiff, as if the stock had been transferred to a new trustee for them. It is now contended that those who * were active * 269 and correct in the assertion and protection of their rights should lose at least the greater part of the benefit of their regularity and diligence in favour of a gentleman who when not inactive was only active erroneously and mischievously, at least during all the time material to be considered, but to whom, as I have stated, I do not impute dishonourable intention. It appears to me that it would be an injustice, tending to the encouragement of negligence and fraud, were we to allow the plaintiff to assert successfully against the defendants any title to the 2400*l.* stock in question. Whether Mr. Carpenter acted as the agent of all the defendants or acted for only some of them is, I apprehend, immaterial. I have not noticed, but have hitherto passed over as not existing, some beneficial interests which seem to have been acquired by F. Tritton in the reversionary share of the defendant William James the younger, and perhaps in that of his brother Thomas James under the deed of 1845. Possibly the plaintiff may as to those interests be entitled to stand in Tritton's place, and the dismissal of the bill, a dismissal which cannot, I think, be displaced, should possibly be expressly without prejudice to any such title.

But the costs here as well as before the Master of the Rolls ought, in my opinion, to fall on the plaintiff. I have not treated T. Bastow as a defendant, for before the hearing at the Rolls he had disclaimed and been dismissed. Whether, if the persons or any person beneficially interested under the will of Turnley had been plaintiffs or a plaintiff before us, together with the actual plaintiff, or instead of him, I should have deemed it right not to dismiss the bill, I need not and I do not say; but it may not be

superfluous to add, that I consider *Franco v. Franco* a binding authority, that were it otherwise I should not dissent from * 270 it, and that of two * cases before me when a Vice-Chancellor, of which the Lord Justice has been so good as to remind me and which he will perhaps mention to-day, neither seems to me to have been erroneously decided.

THE LORD JUSTICE TURNER. — The Lord Chancellor and my learned brother being of opinion that this appeal ought to be dismissed, I can only say, that looking to the case of *Franco v. Franco* (a) and the other authorities referred to in the argument, and to which may be added *May v. Selby* (b) and *Bridget v. Hames*, (c) I am not satisfied that the plaintiff is not entitled to maintain this suit in his character of trustee, notwithstanding the breach of trust which he committed in transferring the fund to Tritton, and that it appears to me, to say the least doubtful, whether the trust in favour of the parties interested under Turnley's will could be defeated whilst the fund remained vested in Tritton, and he continued to be a trustee under that will. I am not, as at present advised, prepared to hold that the *cestuis que trust* under Turnley's will were not entitled to place confidence in their trustees, or were bound to take any proceedings for securing the funds against their acts, or that any priority could be gained over them by reason of their not having taken such proceedings, or by such proceedings having been taken on the part of the defendants to this suit, but all these questions may yet be agitated in any suit which may be instituted on the part of these *cestuis que trust*, and I do not think it right therefore to give any final opinion upon them.

(a) 3 Ves. 75.

(b) 1 Y. & C., C. C. 235.

(c) 1 Coll. 72.

* LIFE ASSOCIATION OF SCOTLAND *v.* SIDDAL. * 271COOPER *v.* GREENE.

1861. June 4, 25. July 13. Before the LORDS JUSTICES.

A married woman being equitable tenant in tail in remainder of an undivided share in lands to be purchased with a sum of trust money, she and her husband joined in mortgaging her interest. The fund was misappropriated. Proceedings having been taken for its recovery, the husband and wife succeeded in obtaining the restitution of her share of the fund, which was brought into Court, with arrears of interest since the time when her estate came into possession. The mortgagee did not concur in any steps to recover this share. The husband, when the mortgage was made, was maintaining his wife, but had become a bankrupt before her interest came into possession, and was uncertificated.

Held by the Lord Justice TURNER, the Lord Justice KNIGHT BRUCE doubting that the wife had no equity to a settlement out of the capital, nor, as against the mortgagee, out of the future income of the fund.

But *held*, that the mortgagee had no claim to the arrears of income of the mortgaged property, which he had taken no steps to recover, and that the assignees of the husband could only take subject to the wife's equity to a settlement,¹ and that the whole arrears ought to be settled.²

THIS case came before the Court on a petition presented by Georgiana Spencer Seaman, the wife of John Seaman, by her next friend, and by the said John Seaman, and by W. H. Green, the solicitor of Mrs. Seaman in the proceedings in these suits, which had for its object the payment of certain costs out of a sum of 2531*l.* 1*s.* 2*d.*, which was in Court in the second cause, and the payment to Mrs. Seaman, for her separate use, of so much of the residue of the fund as consisted of arrears of income, and the investment in bank 3*l.* per cent annuities of what should then remain of the fund, and payment of the dividends on such bank annuities to Mrs. Seaman for her separate use during her life.

¹ See *Lewin Trusts* (5th Eng. ed.), 530; *Perry Trusts*, § 632, and cases in note (5).

² See *Scott v. Spashett*, 3 Mac. & G. 599, and cases to this point in note (2); *Dunkley v. Dunkley*, 2 De G., M. & G. 390, and note (1); 1 Dan. Ch. Pr. (4th Am. ed.) 102, and notes (2) and (7); *Barrow v. Barrow*, 5 De G., M. & G. 782; *Lewin Trusts* (5th Eng. ed.), 530; *Perry Trusts*, § 636, and cases in note (1); *In re Carr's Trusts*, L. R. 12 Eq. 609.

The facts of the case are stated at considerable length in the report of the appeals in these causes. (a) From the statements in that report it will be seen that in the month of April, 1830, the petitioner G. S. Seaman was equitable tenant in tail in remainder of a share of lands to be purchased with a sum of 6300*l.*, and of some other lands designated as the Bawburgh estate, which had
 * 272 * been purchased with trust moneys; and by a deed dated the 20th of April, 1830, and purporting to be made between the petitioner, John Seaman, and Georgiana Spencer his wife, of the one part, and James Currie, of the other part, this share of G. S. Seaman was purported to be mortgaged, with some other property, to James Currie, for securing the sum of 1700*l.* advanced to John Seaman, the husband, and a fine was levied to give effect to this mortgage. It was held by the full Court that this deed passed to Currie whatever interest the petitioner John Seaman could pass in the 6300*l.* or the lands to be purchased with it. The sum of 1700*l.* thus secured by the mortgage was further secured to Currie by the bond of Benjamin Norton, as a surety for the petitioner John Seaman; and under the proceedings in the second of these causes, and in other causes relating to the same matters, the mortgage to Currie was paid off out of the estate of B. Norton, which was represented by some of the respondents to the present petition. In the month of November, 1830, the petitioner John Seaman became bankrupt, and he never obtained his certificate. The estate tail in remainder of G. S. Seaman in her share of the lands to be purchased with the 6300*l.* came into possession in the year 1845, upon the determination of the prior estates. Proceedings were taken in *Life Association of Scotland v. Siddal* with respect to Mrs. Seaman's interest in the 6300*l.* which proceedings were originally promoted by the petitioner John Seaman and G. Spencer his wife, and by Charles Lee the assignee under John Seaman's bankruptcy, and were afterwards prosecuted by Mr. and Mrs. Seaman alone. The claim in respect of this share was resisted on the ground that all right to recover it had been lost by Mrs. Seaman's acquiescence before her marriage in the breach of trust by
 * 273 which the fund had been placed in improper * hands; but, as appears from the report above referred to, the full Court decided that Mrs. Seaman had not so acquiesced as to lose her

(a) *Supra*, 58.

rights; and the result was, that there was recovered in respect of her share the sum of 2531*l.* 1*s.* 2*d.*, which was composed of 1575*l.* capital and 956*l.* 1*s.* 2*d.* interest accrued since the estate tail of Mrs. Seaman came into possession, and it was to these sums that the present petition related.

The case made by the petition, apart from the questions as to costs, which do not appear to call for a report, was, that Mrs. Seaman was entitled, by way of equity, to a settlement, to have the arrears of income paid to her for her separate use, and to have the whole future income of the 1575*l.* secured to her during her life for her separate use, without power of anticipation.

Mr. Toller and Mr. Archibald Smith, for the petitioners. — This money has the character in equity of real estate, but the interest of Mrs. Seaman is only equitable, and cannot be recovered without coming here. A settlement therefore is of course. *Sturgis v. Champneys*, (a) *Wortham v. Pemberton*. (b) This fund is not liable to Currie's mortgage, not having been in existence at the time, though that deed may pass the husband's interest. *Tidd v. Lister* (c) does not apply. There the life-interest, of which the husband disposed, was in possession; here it was in reversion. The arrears of income at all events are a money fund which ought to be settled. The mortgagee cannot have any claim to them, for he never was in possession as mortgagee; so to give them to him would be giving him an account of back *rents, and * 274 the claim of the husband's assignees is of course to be postponed to the wife's equity.

Mr. Cracknall, for the assignee in bankruptcy of Mr. Seaman. — I contend that the arrears of income ought to be paid to the assignee. There is no case in which the Court has laid its hands on arrears of income, and settled them for the benefit of the wife. *Tidd v. Lister* is opposed to any such proceeding. The husband is entitled to the income of the wife's property not settled to her separate use, until she asserts her equity to a settlement; so arrears of income ought to belong to him, not to her. The mortgagee, for the reason given by the petitioners, cannot establish any claim to the arrears.

(a) 5 Myl. & Cr. 97.

(b) 1 De G. & Sm. 644.

(c) 10 Hare, 140; 3 De G., M. & G. 857.

point them executors of this my will. I also give and bequeath the whole of my estate and effects whatsoever and wheresoever absolutely unto the said Richard Barrett, Jonathan Barrett, and Robert Williams, to hold the same unto them, their executors and administrators, according to the several natures and tenures thereof, charged nevertheless and I do hereby charge so much of my estate as shall at the time of my decease consist of long annuities to and with the payments to the several persons hereinafter mentioned during the continuance of such long annuities, if

the several parties to whose benefit the same was intended
* 280 *so long live." Then followed a number of charges for

different persons for their lives, if the long annuities should so long continue, with a direction that, in case of the personal incapacity of any of the donees, the said "executors or the survivors or survivor of them" should apply the portions of such incapacitated persons for their benefits. The testator then made various charges on his reduced bank annuities, some of them being gifts of sums to be accumulated, and declared that, in all cases, where he had directed any gift or payment to be accumulated, his "executors" should be at liberty to invest on mortgage or in the funds, or in such other manner as therein mentioned, as they or either of them might think fit or most expedient, and should not be responsible for any loss arising from the exercise of such discretions as to the mode of investment, unless the loss should be wilful. The testator then gave the "executors" power to vary the securities in which any parts "of the several gifts, bequest, and legacies" might be invested, and declared, at great length, that they should not be answerable for any loss arising from investments, unless the loss was wilful. "And I also direct, that all costs, charges, and expenses which my said executors or any of them may incur or become liable to shall be borne and sustained by any moneys which may come to their hands from any part of my estate; and out of such moneys, from whatever source derived, I direct all of them to deduct, retain, and apply such sums as will fully reimburse themselves respectively."

The testator died in 1837. The will was proved by Jonathan Barrett alone. He died in 1860, and this bill was filed against his executors by one of the testator's next of kin, to establish the title of the next of kin to the residuary personal estate. The

Master of the Rolls made a decree declaring that the personal estate * was bequeathed to the executors as trustees, * 281 and directed accounts and inquiries on that footing. The defendants appealed.

Mr. Roundell Palmer and *Mr. Eddis*, in support of the decree. — We say that on the whole scope of this will it is reasonably clear that the testator intended the executors to take in a fiduciary capacity only. In the first place he does not give them the residue but the whole estate, placing them in the positions in which the law would have placed them if he had made no bequest to them. He gives to them in joint-tenancy, which raises a presumption against their being intended to take beneficially. He gives them legacies, which under the old law would be enough to exclude them from taking the residue beneficially. (a) It is irrational to suppose that when he gave them these legacies he intended them to take the residue beneficially. It cannot be argued here, as in some cases, that he gave them legacies in order to guard against the event of his assets being insufficient for his other legacies; such reasoning cannot be applied to these trifling legacies. Then he authorizes the executors to retain their costs and expenses out of the estate. Such a direction is inconsistent with an intention that they should take beneficially, and it was so held under the old law. *Dean v. Dalton*. (b) The testator does not call the executors by that title in the gift to them, but in the subsequent parts of the will he uniformly does so, thus showing that he contemplated their holding his personal estate solely in that character. It makes no difference that the testator uses the word “absolutely” in the gift; *Attorney-General v. Malkin*, (c) * *Hames v. Hames*, (d) *Meryon v. Collett*, (e) that word only showing the quantity of the estate they are to take. * 282

Mr. Selwyn and *Mr. Hardy*, for the appellants. — The testator gives to his executors legacies, not in the character of executors, but describing them as his good friends; that gift is made to them beneficially. He then gives his property “absolutely” to the same persons, not describing them as executors, and only charging

(a) 2 Wms. on Exors. 1268 (4th ed.).

(c) 2 Phil. 64.

(b) 2 Bro. C. C. 635.

(d) 2 Keen, 646.

(e) 8 Beav. 386; 6 Moo. Ind. Appeal Ca. 1.

it with legacies, and using the word "also," which assimilates the second gift to the first. If he had intended them to take it merely in the character of executors, he would have described them as executors in the gift. The word "charge" is repeated again and again as to the legacies: it is an appropriate word according to our view of the case, but most unsuitable if the plaintiff's view be adopted. The direction as to costs, charges, and expenses is not superfluous; it was intended to provide for the case of the legacies invested and held in trust after the residue had been administered and disposed of. It is clear on the will that the testator intended to dispose of the whole of his property. *Dawson v. Clarke*, (a) *Ellcock v. Mapp*, (b) *Williams v. Roberts* (c) are in our favour.

[The Lord Justice TURNER referred to the use of the word "executors" in the direction for investment.]

They are executors, and a legatee suing them for his legacy must sue them as such.

[THE LORD JUSTICE TURNER. — But would they hold the fund as executors if they took it subject to a charge created by the will?]

Yes, till they had assented to the bequest. If the donees of the residue and the executors had been different persons, * 283 the former could not have been sued * alone, for the executors had duties with respect to the fund. The gift of legacies to the executors does not go for much in a case of this nature. It is enough in cases coming under the old law to rebut the right of an executor to take beneficially the undisposed-of residue, but is not enough to control the effect of a direct gift.

Mr. Palmer, in reply. — The appellants must contend that if the executors had not proved the will or acted, they would still have been entitled as residuary legatees. The argument that the gift was made to the executors in the character of executors has not been met. Though the word "executors" does not occur in the gift, there are various indications of the intention in the will.

(a) 18 Ves. 247.

(c) 4 Jur. N. S. 18. — V.-C. S.

(b) 3 H. L. Cas. 492.

The duties as to investment are to be performed by the "executors;" but if they took all the property beneficially, subject to a charge, this duty would not belong to them as executors, but as legatees. The testator speaks of these duties being performed by them or the survivors or survivor of them, showing that he contemplated the continuance of the joint tenancy created by the words of gift, which he could not have contemplated had the gift been for their own benefit. The gift of legacies is as strong here as in a case under the old law. As to undisposed-of residue, it is a question of construction what the testator meant. The argument on the other side as to the provision with respect to costs makes the testator say that costs belonging to one fund may be paid out of another.

Judgment reserved. .

July 13.

THE LORD JUSTICE KNIGHT BRUCE.—The question of partial intestacy raised by this suit may fairly, I think, be considered one of difficulty. But *after having attended care- * 284 fully to the contents of the testator's will and codicils, the judgment of the Master of the Rolls, the authorities cited before us, and the arguments of counsel, I remain not convinced that William Saltmarsh the testator died partially intestate, or that the plaintiff has any title; and, with deference to the Master of the Rolls, my impression is that the bill ought to be dismissed. The provisions that the will makes for the executors' indemnity, including their costs, charges, and expenses, are, I think, consistent with that view, for they were unquestionably made trustees of some portion or portions of the testator's personal property. The executors, I repeat, seem to me to have been made residuary legatees for their own benefit absolutely. But I am far from confident as to the accuracy of this conclusion, which indeed, as it differs from the united opinions of the Master of the Rolls and my learned brother, is probably erroneous, and will certainly not cause any alteration in the decree.

THE LORD JUSTICE TURNER.—The Master of the Rolls considered this question to be one of very considerable difficulty, and certainly I have not felt it to be otherwise, for it has very much

perplexed me, but upon the whole I agree in the conclusion at which his Honor has arrived.

The testator died in May, 1837, long after the statute 1 Will. 4, c. 40, came into operation, and looking at the decision in *Love v. Gaze*, (a) I am not satisfied that the statute alone did not furnish a sufficient foundation for this decree. His Honor, however, * 285 appears to have * thought otherwise, and my learned brother being, as I collect from him, of the same opinion, I cannot venture to dispose of the case upon that point, and desire, therefore, to be understood as giving no opinion upon it.

I shall consider the case, therefore, as his Honor appears to have done, wholly without reference to the statute. Looking at the case in this point of view, there can, I think, be no doubt that the defendants, in order to maintain the claim insisted upon by them, are bound to show that the residue of the estate was by this will given absolutely and beneficially to the three persons who are named as the executors. Upon any other footing those three persons must, as it seems to me, have been trustees for the next of kin, by reason, amongst other things, of the equal legacies which they take under the will. The question therefore is, whether, upon the true construction of this will, the testator intended to give the residue to these three persons, not only absolutely but beneficially also. That the words of gift which the testator has used would be sufficient to pass the residue to these three persons, both absolutely, as the testator has expressed it, and beneficially, cannot be doubted; and, no doubt, we are bound to collect the testator's intention from the words which he has used; but then it is from the words of the whole will, and not of the particular clauses only, that the intention must be collected. This has been the view which has been taken in all the cases.

Now it is to be observed that the gift to these three persons is of the whole of the testator's estate and effects; but the testator had before directed his debts, legacies, and funeral and testamentary expenses to be paid, and had before given several legacies to charities, and equal legacies of small amount to the * 286 executors. He must * have intended, therefore, that these payments should be made out of what was given to these three persons, and that to this extent at least they should take

(a) 8 Beav. 472.

as executors or trustees ; and if it be clear that they were, as to part of the gift, to take in either of those characters, I cannot see my way to hold that, as to the rest of the gift, they could be intended to take beneficially. The gift to these persons, too, is in joint tenancy, which is indicative of trust ; and the long annuities, so far at least as they are charged, are treated as remaining vested in them as executors. It may be observed, too, that the power to vary securities is not in terms expressed to be, and I doubt whether it was meant to be, confined to the period of the subsistence of the charges. Again, there are here equal legacies to these three persons who are appointed to be the executors, and these legacies must be payable out of the estate which is said to be given to these three persons beneficially, so that the testator, according to the appellant's contention, was at the same time giving to these three persons part and the whole of the same estate. It was said that these legacies may well have been given for the purpose of putting the executors to that extent upon the same footing as the other legatees ; but that argument has been urged in many cases in which the question has been whether executors to whom there was no express gift were trustees of the residue for the next of kin, and it has not succeeded. I do not see my way to hold that much if any greater weight is due to the argument in cases in which there is a gift to the persons who are the executors, when the question is what is the nature and character of that gift. There is, besides all this, the indemnity clause, which extends to the whole estate ; and it is surely difficult to suppose that the testator could intend to provide for the indemnity of the executors out of funds which he intended them to take beneficially. Looking to all these considerations, I have * come, though certainly not without doubt, to the same * 287 conclusion as the Master of the Rolls, that this testator did not intend that these executors should take the residue beneficially, and the appeal, therefore, must be dismissed ; but, as my learned brother has come to a different conclusion, there will of course be no costs of the appeal.

NEWBY *v.* HARRISON.

1861. July 25, 26. Before the LORDS JUSTICES.

An undertaking given by a plaintiff upon obtaining an injunction, to abide by any order the Court may thereafter make as to any damages that may be occasioned to the defendants by the injunction, remains in force notwithstanding the dismissal of the bill.¹

An inquiry as to damages will in such a case be granted where the plaintiff's case fails by reason of his having no right to interfere with the Act which he seeks to restrain, though the defendant was a mere trespasser.²

THIS was a motion by the defendants by way of appeal from a decision of Vice-Chancellor Wood, who had refused to direct an inquiry as to what damages had been sustained by the defendants in consequence of the granting an injunction restraining them from taking ice from a canal.

On the 16th of February, 1860, the plaintiff obtained an interim injunction, he by his counsel "undertaking to abide by any order this Court may hereafter make as to any damages that may be occasioned to the defendants by this order." On the 30th of January, 1861, the bill was dismissed with costs by the Vice-Chancellor, (a) on the ground that the plaintiff had not established any such exclusive right to the ice as to entitle him to interfere with the abstraction of it by the defendants, though his Honor was inclined to hold that the defendants in taking it were mere trespassers. No inquiry as to damages was asked for at the hearing, nor was the question of damages reserved, the order being simply for dismissal of the bill with costs. The plaintiff appealed, * 288 * and the appeal on the 6th of March, 1861, was dismissed with costs by the Lord Chancellor. The defendants, on the 10th of July, moved before the Vice-Chancellor for an inquiry as

(a) 1 J. & H. 393.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1666.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1678. In the United States Courts the plaintiff and his sureties, on an injunction bond, cannot be ordered by the Court sitting in equity to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond. *Merrifield v. Jones*, 2 Curtis, 306. See *Bein v. Heath*, 12 How. (U. S.) 168. In New Jersey, by rule in Chancery, the damages may be ascertained in such manner as the Chancellor shall direct. Rule 42; 2 McCarter, 522.

to damages, and his Honor, on the 19th, refused the motion without costs, (a) being of opinion that he had no jurisdiction to make a hostile order against the plaintiff personally after the bill had been dismissed.

The defendants now renewed the motion by way of appeal before the Lords Justices.

Mr. Rolt and *Mr. W. Morris*, for the motion. — The Vice-Chancellor held that he had no jurisdiction to make an order, there being now no suit before the Court. Orders, however, may in some cases be made, though a bill has been dismissed. *Black v. Creighton*, (b) *Roundell v. Curren*, (c) *Wright v. Mitchell*. (d) We do not, however, rely upon that. What we contend is, that the Court has jurisdiction over the plaintiff by virtue of his undertaking, and that there is no reason for holding the engagement into which he entered with the Court to be determined by the dismissal of his bill. It is not the suit that gives the Court jurisdiction over him, and the determination of the suit cannot take it away.

Sir H. M. Cairns and *Mr. Shebbeare*, for the plaintiff. — The hearing of the cause was the time at which the rights of the parties were to be finally disposed of, and the defendants must abide by the order then made. If they wish to reserve their remedy under the undertaking, they ought to have asked to have the bill dismissed * without prejudice to the undertaking. * 289 There is no authority for making such an order as is now asked for after the dismissal of a bill and while no suit is pending. *Wright v. Mitchell*, (d) *Farquharson v. Pitcher*. (e)

Mr. Morris, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — With the most respectful deference to the Judge from whose court this case comes, I am of opinion that the jurisdiction of the Court is not lost by reason of the dismissal of the bill, and that the undertaking continues in force, and therefore is enforceable by the order of the Court. No

(a) 1 J. & H. 678.

(d) 18 Ves. 293.

(b) 2 Moll. 557.

(e) 4 Russ. 510.

(c) 6 Ves. 250.

doubt the right of calling upon the Court to enforce it might have been lost by delay and conduct, but in my judgment there is not in the present case any delay or conduct which can have that effect. Unless therefore the Lord Justice differs from me, the motion will be proceeded with upon the footing that the jurisdiction exists, and that the defendants, if entitled to any thing, are not coming too late.

THE LORD JUSTICE TURNER. — I agree with the Vice-Chancellor Wood in thinking this a question of importance; for if the dismissal of the bill puts an end to such an undertaking as that now before us, all those undertakings which are given upon the occasion of injunctions being granted and many other undertakings given in causes are useless, and the precautions which the

Court has taken for the protection of the persons against
* 290 whom the orders are made are nugatory. *The true prin-

ciple appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit, but absolutely; that the undertaking is an absolute undertaking that he will be liable for any damages which the opposite party may have sustained, in case the Court shall ultimately be of opinion that the order ought not to have been made. After a party has voluntarily entered into such an undertaking, it does not lie in his mouth to say that, because the suit is out of Court, the Court has no jurisdiction over him; for the jurisdiction does not arise from the suit, but from his own undertaking. In my opinion, therefore, the jurisdiction still remains, and we must hear the case upon the question whether under the circumstances this jurisdiction ought to be exercised, for there may be cases in which the Court will not consider it just to enforce an undertaking, though the jurisdiction to do so exists.

July 26.

Sir H. M. Cairns and *Mr. Shebbeare*, for the plaintiff, then contended that an inquiry as to damages ought not to be directed, for that the defendants in taking the ice were mere trespassers; and although it had been decided that the plaintiff had no such right to it as to entitle him to interfere, still damages ought not to be given them because he had prevented them from doing what they had no right to do. They urged therefore that, if an inquiry

was directed at all, it ought to be, what damage the defendants had sustained by being prevented from taking ice which they could "rightfully" have taken.

Their Lordships directed an inquiry in the following terms:—

"Whether in respect of such ice, if any, as the defendants or either of them were or was, as between them * or * 291 him on the one hand and the plaintiff on the other hand, entitled to take from, &c., between the 15th and the 25th days of February, 1860, any and what amount of damage was occasioned to the defendants by reason of the said order dated the 16th day of February, 1860." (a)

In the Matter of PELL'S TRUST.

AND

In the Matter of The ACT FOR THE BETTER SECURING TRUST FUNDS, AND FOR THE RELIEF OF TRUSTEES.

1861. July 27. August 6. Before the LORDS JUSTICES.

A testator gave a fund to his wife for life, and after her death to his seven sons and daughters, or such of them as should be living at the death of his wife, and the issue of such of them as should be then dead leaving issue, share and share alike, the issue not to take larger shares among them than their respective parents would have been entitled to if living. One of the testator's sons who survived him died in the lifetime of the widow, leaving a child, who afterwards also died in the lifetime of the widow: *Held*, by the Lord Justice TURNER, affirming the decision of the Vice-Chancellor STUART, that the child took a vested interest, and that her representative was entitled to a share of the fund.¹

THIS was an appeal from a decision of Vice-Chancellor STUART, on the construction of the will of Thomas Pell.

The testator by his will dated the 18th of December, 1836, gave

(a) Reg. Lib. B. 1861, fol. 1960.

¹ See 2 Redfield Wills (1st ed.), 374, note (42); *Heasman v. Pearse*, L. R. 11 Eq. 522; *Penny v. Clarke*, 1 De G., F. & J. 425, note (1).

the income of his residuary personal estate to his wife for her life, and after her death he gave the capital "unto, between, and amongst my seven children, Elizabeth, now the wife of John Bradshaw, John Pell, Mary now the wife of Francis Kilburn, Ann now the wife of George Mobbs, Samuel Pell, Sarah now the wife of Robert Frisby, and George Pell, or such of them as shall be living at the decease of my said wife, and the issue of such of them as shall be then dead leaving issue, share and share alike, * 292 but such issue respectively not to * have or be entitled unto a larger share or proportion of such moneys amongst them than their parent or respective parents would have been entitled to if living." The will contained the following advancement clause: "And I also empower my said trustees, if occasion shall require, to pay and apply any part or parts not exceeding altogether one-half of the capital of the vested or presumptive share or shares of any one or more of the issue of my said deceased children of and in the moneys aforesaid during their minority or respective minorities for his, her, or their respective advancement in the world.

The testator died in January, 1837, leaving his wife and the seven children named in his will surviving. John Pell died in May, 1840, leaving an infant daughter, Mary Norman Pell, who died an infant on the 15th of July, 1840. The testator's widow died in 1859, and the question now was, whether the infant daughter of John Pell had acquired an indefeasibly vested interest, so as to entitle her personal representative to participate in the fund. The Vice-Chancellor decided that she had, and the surviving children of the testator appealed.

Mr. Boys, for the appellants, referred to *Bennett v. Merriman*, (a) *Macgregor v. Macgregor*, (b) *Penny v. Clarke*, (c) *Re Kirkman's Trust*, (d) *Berkeley v. Swinburne*. (e)

Mr. Peck, for the representative of the deceased child, John Pell, referred to *Barker v. Barker*, (g) *Lyon v. Coward*, (h)

(a) 6 Beav. 360.

(b) 2 Coll. 192.

(c) *Ante*, vol. 1, p. 425.

(d) 3 De G. & J. 558.

(e) 16 Sim. 275.

(g) 5 De G. & Sm. 753.

(h) 15 Sim. 287.

Re Wildman's Trust, (a) *Bellamy v. Hill*, (b) * *Hodgson v. Smithson*, (c) *Harcourt v. Harcourt*, (d) and *Smith v. Palmer*. (e) * 293

Mr. Boys, in reply.

Judgment reserved.

August 6.

The Lord Justice TURNER, after stating the facts of the case, proceeded as follows : —

Gifts of this description are, I think, as I intimated in *Penny v. Clarke*, to be considered as gifts to an entire body composed of two separate classes, — the children who shall be living, and the issue of those who shall be dead, and it does not seem to me to follow that, because there is a contingency as to one of the classes, there must be a contingency as to the other also.

On the contrary, the introduction of the words of contingency in the one case and the absence of them in the other, tends, I think, to the opposite conclusion, that contingency in both cases was not intended.

Suppose the gift had been confined to the latter class, the issue of the deceased children, there would, I apprehend, be no reasonable doubt that the issue of a deceased child living at the death of the child would take a vested interest, and I do not see why the circumstance of other objects, whose interests are contingent, being introduced into the gift, should vary that construction.

The observations made by the Vice-Chancellor WOOD in the case of *Re Wildman's Trust*, as to the difference * of the * 294 position of the children and of the issue in a case of this description, seems to me well worthy of attention.

It is to be observed, too, that the leaning of the Court, especially in cases of residue, is in favour of vesting, and that to construe the interests of the issue to be contingent, might in many cases lead to intestacy.

(a) 1 J. & H. 299.

(c) 21 Beav. 354.

(b) 2 Sm. & G. 328.

(d) 5 W. R. 478; 26 L. J. 536. — V.-C. K.

(e) 7 Hare, 225.

Looking at the case, therefore, without reference to the authorities, my opinion agrees with that of the Vice-Chancellor.

The authorities on this question are not in a very satisfactory state.

There are the opinions of Sir JAMES WIGRAM, Sir RICHARD KINDERSLEY, the late Sir JAMES PARKER, Sir WILLIAM PAGE WOOD, and the late Vice-Chancellor of England in one case, in favour of the vesting.

On the other hand, my learned brother seems uniformly to have entertained a different opinion; and his view is not unsupported by other authorities: I refer particularly to the case before Lord LANGDALE, and to another case, before the late Vice-Chancellor of England, which was cited in the argument.

In the two latter cases, however, there seems to have been a context in the will affecting the question, and I think, therefore, the weight of the authorities is in favour of the vesting.

My learned brother however is not, I believe, satisfied with the Vice-Chancellor's decision, and the case therefore must rest upon my judgment alone.

* 295 * I observe that this is hardly the first time we have agreed to differ upon the point. See *Kirkman's Trust*. (a)

It was attempted in the argument to distinguish this case upon the ground of the reference to presumptive shares in the advancement clause, but I do not think that any distinction can be made upon that ground. The widow being tenant for life, the clause could not be intended to apply during her life.

This appeal therefore must be dismissed; but I think, looking at the state of the authorities, without costs.

(a) 3 De G. & J. 558.

FREEMAN v. PENNINGTON.

1861. December 10. Before the LORDS JUSTICES.

After a decree for administration of a testator's estate had been made at the suit of a mortgagee of the share of one of the residuary legatees, the same residuary legatee made another mortgage of his share by a deed, in which the plaintiff concurred, and by which it was agreed that the two incumbrances should rank *pari passu*. An order on further consideration was then made, without bringing the new incumbrancer before the Court. *Held*, that he might be brought before the Court by supplemental order, under 15 & 16 Vict. c. 86, § 52, without a supplemental bill.¹

THIS was an application for a supplemental order under 15 & 16 Vict. c. 86, § 52.

The suit was an administration suit instituted by Richard Freeman, who was a mortgagee of the defendant Pennington's share in the testator's residuary estate. By the decree the common accounts and inquiries were directed. After decree, Pennington, by indenture dated the 14th of January, 1861, mortgaged his share to Cooper and Parker for 5000*l*. The plaintiff concurred * in the deed, and it was thereby agreed between the parties * 296 that the plaintiff's security and that of Cooper and Parker should be payable *pari passu*.

An order, on further consideration, was made on the 11th of July, 1861, containing declarations as to the rights of the parties, and directing certain accounts and inquiries.

In December, 1861, the plaintiff applied for a supplemental order to make Cooper and Parker parties to the suit. The registrar desired the case to be mentioned to the Court. Vice-Chancellor STUART considered the case not to come within the 52d section of the Act, and declined to make the order.

Mr. Hardy now renewed the application before the Lords Justices. He referred to *Wilson v. Autchterlony*, (a) and *Atkinson v. Parker*. (b)

Their Lordships, being of opinion that the case was within the Act, made an order, that the order on further consideration, and

(a) *Morg. Ch. Orders*, 181; 1 W. R. 34. (b) 2 De G., M. & G. 221.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1524, 1525.

the accounts and inquiries thereby directed, and the proceedings thereunder, should be carried on and prosecuted between the plaintiff and Parker and Cooper in like manner as they might have been if Parker and Cooper had been originally defendants.

* 297 * In the Matter of THE ELECTRIC TELEGRAPH
COMPANY OF IRELAND.

BUDD'S CASE.

1861. November 4, 20. Before the LORDS JUSTICES.

A solicitor, who was a shareholder in an incorporated company, knowing it to be in difficulties, transferred his shares to his farm bailiff, a man without property. The transfer purported to be made for 50l., but no such sum was ever paid, nor had the transferee ever agreed to pay any sum. The transferror admitted that he had made the transfer to get rid of his liability, and had asked the transferee to take the shares off his hands. He also stated that he had informed the transferee (who had no other advice) that the company was in difficulties; that the shares were worthless, and that a liability might attach to the ownership. The transferee stated that he had never looked upon himself as owner; that he had always considered that the shares were merely put into his name to serve some purpose of the transferror's, and that he had always understood that he should be indemnified. The company having been ordered to be wound up, the transferror, as solicitor of the transferee, but without communication with him, made an offer to contribute a sum towards the debts of the company to escape all further liability. He admitted that this sum was to have come out of his own pocket: *Held*, affirming the decision of the Master of the Rolls, that the transfer must be held to have been merely colourable, and that the transferror was a contributory.¹

An appeal motion by a contributory to have his name taken off the list being refused with costs as against the official manager, the creditors' representative, who appeared, though not served, was allowed his costs out of the estate.

THIS was a motion by way of appeal from an order of the Master of the Rolls placing the name of Mr. Budd on the list of contributories.

The company was formed in 1852, and completely registered in

¹ See Hyam's Case, 1 De G., F. & J. 75, and cases in note (1); Costello's Case, 2 De G., F. & J. 302, and note (1); Musgrave and Hart's Case, L. R. 5 Eq. 204; King's Case, L. R. 6 Ch. Ap. 196.

December of that year. In August, 1853, an Act (16 & 17 Vict. c. 123) was passed incorporating the company, but without restricting the liability of the shareholders, and in this Act the Companies Clauses Consolidation Act, 1845, was incorporated. Mr. Budd took at different times shares amounting in all to 1000, the last being taken by him in March, 1853.

By the year 1855, the company was in difficulties, and on the 30th of April in that year Mr. Budd, who was a solicitor, transferred the shares to John Crocker, his farm bailiff, by a deed which expressed the consideration to * be the sum of * 298 50*l*. It was admitted, however, that no sum in fact passed from Crocker to Mr. Budd, and that Crocker had no property. The transfer was registered in the register of transfers.

On the 7th of May, 1856, an order was made for winding up the company. The official manager placed the name of Crocker on the list of contributories in respect of these shares, and in January, 1857, it was settled upon the list by the Judge in Chambers. It having been discovered, however, that Crocker was only Mr. Budd's farm bailiff, inquiries were made as to the circumstances of the transfer, and Mr. Budd was examined on the subject.

Mr. Budd admitted in his examination that the transfer was made without any consideration, "the transaction being simply this,—that I had entertained great fears that the company was in a very bad condition, and I desired to get rid of my liability, and I applied to Crocker (who was a man who was under obligations to my family, independently of his being my servant) to accept a transfer of my shares. I pointed out to him what I believed to be the condition of the company, that they would probably break up, and that I wished to get rid of my liability, and would he take that liability off my hands, that is, would he take the shares off my hands. He consented to do so." Mr. Budd then stated the grounds of his belief that the company was in a bad state, which were, that a report of a very unfavourable character had been issued not long before, and that one of the directors had asked him to lend 250*l*., as the company was in difficulties. He further stated, that he had informed Crocker of his belief as to the state of the company, and told him that the shares were worthless and would be of no use to him, and that to the best of his belief he * had explained to Crocker that a liability would attach to * 299 the ownership of them. In reply to a question whether if

the company had turned out prosperous he should have expected Crocker to account with him for the dividend and return the shares, he said: "Certainly not; it never entered my head that they could by possibility be of any value, and therefore it never occurred to me to say a word about it."

Mr. Budd admitted that he had, after the winding-up order, made an offer signed "Thomas William Budd, attorney for Mr. Crocker," offering a contribution of 600*l.* towards the debts of the company, so as to render it unnecessary to carry on the winding-up; that this was done without any communication with Crocker, and that the money was to have come out of his own pocket. He said, in explanation, that he had not felt sure what the result might be if the transfer to Crocker were disputed, and had therefore thought it worth while to offer this sum in order to avoid all questions.

The circumstances in which the transfer was made were stated as follows in the evidence given by Crocker:—

"Mr. Budd told me he had some shares in a company he wished to place in my name, and he produced a transfer to me of them, which I signed, but I clearly understood he would hold me harmless from all loss in respect of the said shares. He said the transfer was a mere form, and I would never hear any thing more about it. I never understood or considered that the shares belonged to me, or that I could sell them or do what I liked with them. I understood the transfer was a mere form for some object of Mr. Budd's; he did not say what, nor did I inquire. I considered the shares were Mr. Budd's, notwithstanding the transfer.

I merely took the transfer of the shares to oblige Mr. Budd.

* 300 If I had been called upon to pay upon them, I should have looked to him to reimburse me, as he was bound in honour to do so. Without Mr. Budd's saying so in so many words, I clearly understood that if any demands were made upon me in respect of the shares he would hold me harmless. I did not consider there was a *bond fide* parting with the shares of Mr. Budd to me. I considered Mr. Budd meant me merely to hold them in my name as a matter of form, to answer some purpose of his; I did not know or inquire what. I never attended any meetings of the company or acted as a shareholder in any way; I was, at the time of the transfer, farm bailiff to Mr. Budd at a salary of one guinea

per week. In signing the transfer, I knew very little what I was doing or the effect of the transfer. I did not read the deed, or observe whether it transferred to me one share, or twenty, or fifty, or indeed any particular number. If the shares had been subsequently sold by Mr. Budd, I should have considered the proceeds Mr. Budd's money, not mine; and if I, at Mr. Budd's request, had sold the shares, I should have accounted to him for the money. I should not have sold them or dealt with them in any way without Mr. Budd's instruction. It never occurred to me to sell the shares, or to meddle with them, the certificates not being in my possession. When the transfer was signed by me, Mr. Budd observed to me, 'I have a transfer to make over to you,' I said 'Very well, sir.' Mr. Budd then assured me I should never harm by it, and that I should never hear any thing more about it. He proposed the transfer as a matter of course to me, I being a servant, and having known his family for many years."

The question came before the Master of the Rolls on a summons adjourned into Court, and his Honor decided that the transfer was not made *bonâ fide*, and that Mr. * Budd's name * 301 ought to be placed on the list of contributories. (a) Mr. Budd now appealed from his Honor's order.

Mr. Jessel, for the appellant. — Taking Crocker's evidence as true, it shows a transfer into the name of Crocker, as a trustee, and he must be the contributory, not Budd. It is not alleged that Mr. Budd made an out-and-out sale, and parted with all his interest in the shares. A partner may be only a trustee for other persons, and yet, as between him and the other partners, he is the only person responsible. *Fenwick's Case*. (b) I contend that under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, not only may a man transfer his shares to a trustee for himself, but transfer them to a pauper as a trustee. By section 14, an unlimited power of transfer is given, "subject to the regulations herein or in the special Act contained," the only limitation imposed being, in fact, that the calls then due have been paid. Under this section, if a shareholder, whose calls had been duly paid, required the company to register a transfer of his shares to a beggar they must comply, and a mandamus would lie if they refused. In

(a) 30 Beav. 143.

(b) 1 De G. & Sm. 557.

Hyam's Case, (a) the shares were transferable by delivery; but a delivery to have any effect must be a delivery made with an intention of changing the ownership. A mere delivery of such shares into the hands of another person, without any intention of changing the beneficial ownership, is no delivery at all for the present purpose; it is like giving them to somebody for safe custody. Here there was a complete legal transfer, so that the case is completely distinguished from *Hyam's Case*. The principles laid down * 302 in *De Pass's Case* (b) are in our favour. * *Ex parte Costello* (c) stands on the same ground as *Hyam's Case*. The legal owner of the shares is clearly a contributory; a mortgagee who takes the shares in his own name is the person liable to the company, and not the mortgagor. The company cannot treat both the trustee and the *cestui que trust* as the owners, nor can it elect; the legal title governs the case. *Hyam's Case* was, I submit, incorrectly applied to *Chinnock's Case*. (d) The company in that case was one formed under the Joint-stock Companies Acts; the right of transfer was not absolute, but subject to the provisions of the deed of settlement, so that the question turned on the construction of that deed. Quite different considerations are applicable to a statutory company. Railway shares would become almost valueless if the company could refuse to register a transfer of them on the ground that they suspected the solvency of the transferee. The case here comes to this, that the transferee, at the request of the transferrer, accepted a voluntary transfer, thus becoming a trustee for the transferrer.

Mr. Selwyn and *Mr. Hamilton Humphreys* appeared for the official manager, and *Mr. Baggallay* for the creditors' representative, but their Lordships adjourned the case at the close of the argument for the appellant on the 4th of November, and the counsel for the respondents were not called upon.

November 20.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, considering the respective stations in life of the appellant *Mr. Budd* and *Mr. Crocker*, the former a solicitor, the latter a farm bailiff, * 303 and the fact * especially that he was the farm bailiff of *Mr.*

(a) 1 De G., F. & J. 75.

(c) 2 De G., F. & J. 302.

(b) 4 De G. & J. 544.

(d) Johns. 714.

Budd; considering the gratitude for kindness shown or services rendered at some earlier period or periods to Mr. Crocker by Mr. Budd, or some member or members of his family, which Mr. Crocker probably or certainly felt; considering the utmost amount of information as to the nature and possible effect or consequences of the transaction of assigning the shares in question to him, which before or at the time of accepting the assignment he can, upon the testimony before us, be taken to have had; and considering that in the transaction or with respect to it he had, if any protector or adviser, none but Mr. Budd alone, — I am upon the evidence, satisfied that Mr. Crocker had originally, nor ever ceased to have, a perfectly good title as between himself and Mr. Budd to be relieved in equity against the assignment, and placed, so far as possible, in the same position as if it had not existed. For every substantial purpose therefore, as between them, there has, I conceive, been continually since the assignment a clear right in equity on the part of Mr. Crocker to reject the transfer.¹ The case accordingly, as between them, appears to me one neither of vendor and purchaser nor of trustee and *cestui que trust*, but of a very different kind. Mr. Crocker having at one time, by reason and on account of the shares in question, not, however, as I must suppose, with his assent or concurrence, been placed on the list of contributories, has been removed from it; nor is, I must also suppose, desirous or willing to be replaced there; and whether the official manager and the creditors' representative, or either of them, might have insisted or might insist on Mr. Crocker's name being retained on the list or restored to it, or not, neither of them does so insist or has so insisted. Each has been and is willing and desirous that the name of Mr. Budd alone should be placed and remain on the list with reference to the shares in question. By Mr. Budd alone * is it contended that he shall not, and that Mr. * 304 Crocker shall be subjected to the liabilities of a contributory on account of the shares, whether, in that event, to be or not to be entitled to claim indemnity from Mr. Budd.

This contention upon his part against the united opposition (for so, whether Mr. Crocker is a party or not a party before us, I hold it in effect to be) of the official manager, the creditors' representative, and Mr. Crocker, I think altogether unsustainable, and I am

¹ See Kerr F. & M. (1st Am. ed.) 183.

of opinion that the appeal should be dismissed, and, at least so far as the official manager is concerned, and, if Mr. Crocker appears, Mr. Crocker also, with costs.

THE LORD JUSTICE TURNER.—I am of the same opinion. I think it clear that, as between the appellant and Crocker, the transfer of the shares by the appellant into the name of Crocker was a mere colourable transaction. The evidence satisfies me that Crocker was the mere instrument of the appellant, intended and attempted to be made use of by him as a shield against the company's claims upon him. The appellant's subsequent conduct with respect to the 600*l.* seems to me to prove that this was the case. He says that he was willing to make this payment in order to avoid the original transaction being called in question, but he assumed to act with reference to this payment as the attorney and agent of Crocker, and he did so without Crocker's authority, and indeed without any communication with him. By assuming to offer this payment in respect of these shares, he seems to me to have admitted that the shares were not Crocker's, but his. It was said, however, on the part of the appellant, that whatever Crocker's right might be to complain of the transfer of these shares, the company have

* 305 no right to complain of * it; that the appellant was entitled, as between him and the company, to transfer the shares to whomsoever he pleased, and the company was compellable to register the transfer; and further, that, assuming Crocker to be the appellant's trustee, he, and not the appellant, ought to be put upon the list: but these arguments appear to me to be more specious than sound. These shares stood in the name of the appellant up to the 30th of April, 1855. Up to that time he was the undoubted owner of them, and he is still the owner of them, unless the transaction with Crocker was valid, and to say that the company cannot complain would be to say that they cannot inquire into the circumstances under which the transfer was made, a position which of course cannot be maintained. As to the right of the appellant to make the transfer, it may well be that he could transfer to whomsoever he pleased, even to a beggar, but his right to do so could not give validity to a transfer which was fraudulent, and it is going much too far to say that a mandamus would have been granted to compel the registry of the transfer. The granting a mandamus in such cases is in the discretion of the Court, and I feel no doubt

that if the facts which are before us were before a Court of Law upon an application for a mandamus, the mandamus would not be granted. The transfer is upon the face of it untrue, purporting to be made for a consideration which was neither paid or agreed to be paid, and the true nature of the transaction was such that it could not be supported. That a Court of Law would compel a company to put such an instrument upon its register seems to me to be out of the question. Then as to retaining Crocker upon the list as trustee. — It is true that he is a trustee by reason of the shares being vested in him, but he is in truth merely the nominee and instrument of the appellant, and under such circumstances I have no doubt * the appellant ought to be put upon * 306 the list. I agree that this application should be refused, with costs.

Mr. Baggallay, for the creditors' representative, who had not been served with notice of the appeal motion, asked for his costs, either against the appellant or out of the estate. He referred to *Aston's Case*, (a) *Hyam's Case*, (b) *Grisewood and Smith's Case*, (c) 20 & 21 Vict. c. 78, §§ 1, 3; and stated that the Master of the Rolls had directed the creditors' representative to attend in Chambers upon the settling the list of contributories.

Mr. Jessel, for the appellant. — The authorities are in favour of the proposition that the costs of the creditors' representative should come out of the estate, but they do not support the contention that the appellant should have to pay them. The creditors' representative is appointed to watch the official manager. There is no occasion for his being watched where the interests of the contributories and the creditors are, as in the present case, identical. The appellant did not serve him on the present occasion, and no useful purpose could possibly be served by his appearance, so there is no reason why the appellant should pay his costs.

Mr. H. Humphreys, for the official manager, urged that none of the expenses of an unsuccessful appeal ought to be thrown on the contributories, which would be the case if they were given out of the estate. That if the creditors' representative had done right in

(a) 4 De G. & J. 320.

(c) 4 De G. & J. 544.

(b) 1 De G. F. & J. 75.

- appearing, he ought to be paid his costs by the appellant,
 * 307 and, * if not, bear his own; but that in any event it was not reasonable that the contributories should bear them.

Their Lordships ordered that the creditors' representative should have his costs of the appeal out of the estate.

HUGHES v. JONES.

1861. November 9, 11, 12, 25. Before the LORDS JUSTICES.

An estate was put up for sale by a particular describing it as "now or late in the several occupations of H. R. and others," and by one of the conditions, it was provided, that on completion, the purchaser should be "let into the receipt of the rents and profits." Some parts of the property were subject to leases for lives, at a low rent. *Held*, that a purchaser, who entered into the contract without knowing of the existence of such leases, could not be compelled to take the title without compensation.¹

A claim for specific performance raising no question of notice or waiver having been filed by the vendor, and a reference as to title in the common form having been made, the order directing which was not appealed from: *Held*, by the Lord Justice KNIGHT BRUCE, that proof of notice to the purchaser of the existence of the leases for lives when he entered into his contract, and proof of subsequent conduct from which a waiver of the objection might be inferred, would not take away his right to compensation.²

Per the Lord Justice TURNER, whether the question of a purchaser having waived his right to compensation may not be entered into upon further consideration, though not raised by the pleadings, *quære*.³

THIS was an appeal by the defendant from two orders of the Master of the Rolls made in a vendor's suit for specific performance, by one of which orders his Honor refused a motion by the defendant to vary the chief clerk's certificate, and by the other, being an order on further consideration, decreed a specific performance with costs against the purchaser.

¹ See 2 Dart V. & P. (4th Eng. ed.) 416, 792; *Martyr v. Lawrence*, 2 De G., J. & S. 261.

² See 2 Dart V. & P. (4th Eng. ed.) 402, 979; 1 Sugden V. & P. (8th Am. ed.) 305.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1368.

The property in question was purchased for 1500*l.* in September, 1855, under a particular and conditions of sale, in which it was described as "A freehold estate to be sold by auction (by order of the executors of the late Stephen Roose, Esq.) at the Dinorben Arms, &c., on Tuesday, September 18, 1855, subject to the under-mentioned conditions: Two tenements, called Penbryn and Tymaur, containing thirty-one acres, more or less, together * with several dwelling-houses and gardens attached, now * 308 or late in the several occupations of Hugh Roberts and others, situate at Moelfra, in the county of Anglesea. Also two extensive lime quarries, well situate for shipping." The conditions provided, that on completion of the purchase the purchaser should be let "into the receipt of the rents and profits" of the property, not mentioning "possession."

At the time of the contract four tenements, forming part of the property, were subject to leases for lives, granted respectively in 1803, 1810, and 1814, at low rents. There was a conflict of evidence as to the time at which the purchaser first became aware of the existence of these leases. The conclusion drawn by the Lord Justice TURNER from the evidence was, that there was nothing to show that he knew of them till May, 1857, before which time there had been much dispute about the title, and that an objection in respect of them had been made in or before October, 1857. In 1858, a claim for specific performance, in the common form, was filed, and on the 13th of July, 1858, an order was made in the common form declaring that the agreement ought to be specifically performed, in case a good title could be made, and directing the usual reference as to title, and inquiring when a good title was first shown.

In June, 1860, a certificate was made, by which, after finding that a good title could be made to the property, except the four tenements which were subject to the leases for lives, the chief clerk certified as follows: "And especially I certify that the defendant, prior to entering into and signing the said agreement in the plaintiff's claim mentioned, had notice of the above-mentioned four leases, and that he made no objection to the completion of the said agreement on the ground * of the existence of * 309 such leases, until after the plaintiffs had filed their claim in this cause." Another certificate, made in March, 1861, was as follows: "With the exceptions mentioned in my certificate of

June, 1860, a good title to the premises comprised in the agreement in the plaintiffs' claim mentioned was first shown on the 8th of July, 1859." On the 25th of April, 1861, the cause having come on for further consideration, and on an application by the defendant to vary the certificate of June, 1860, by striking out the words "and that he made no objection to the completion of the said agreement on the ground of the existence of such leases until after the plaintiffs had filed their claim in this cause," his Honor refused the application with costs, and decreed specific performance. The defendant appealed from the order refusing the motion to vary the certificate and from the order on further consideration.

Mr. Craig and Mr. C. T. Simpson, for the appellant. — We say in the first place that the question of waiver is not open to the plaintiffs, there not being any allegation in their claim that the defendant waived any thing to which he was entitled. *Clive v. Beaumont*, (a) *Gaston v. Frankum*, (b) *Sugd. Vend. & Purch.*, (c) *Johns v. Mason*. (d) But, assuming the question open, we say that the evidence does not fix the defendant with any such notice of the leases at the date of the contract as would bind him to take subject to them. Notice of a lease is notice of the interest of the lessee as between purchaser and lessee, but not as between vendor and purchaser. A vendor must be precise and accurate in his statements. *Cadman v. Horner*, (e) *Lachlan v. Reynolds*. (g)

* 310 Here there was a false representation on the * conditions of sale, the vendors professing to sell an unincumbered fee. Such a lease as this is fatal to the title. *Collier v. Jenkins*, (h) *Lynam v. Cottree*. (i) The form of the decree precludes the plaintiffs from raising the question of acquiescence or waiver. *Legrand v. Whitehead*, (k) *Wilkinson v. Hartley*. (l) The order is erroneous as to costs. *Sugd. Vend. & Purch.*, (m) *Seton on Decrees*, (n) *Gibbons v. Board of Management of North Eastern Metropolitan Asylum District*, (o) *Potter v. Crossley*, (p) *Wilkinson v. Hart-*

(a) 1 De G. & Sm. 397

(b) 2 De G. & Sm. 561.

(c) Page 286 (13th ed.).

(d) 9 Hare, 29.

(e) 18 Ves. 10.

(g) Kay, 52.

(h) Younge, 295.

(i) 7 Ir. Eq. Rep. 176.

(k) 1 Russ. 309.

(l) 15 Beav. 183.

(m) Page 534.

(n) Page 252 (2d ed.)

(o) 11 Beav. 1.

(p) 5 W. R. 35. — V.-C. K.

ley. (a) We are entitled to be released from our contract and to have the deposit returned. *Anson v. Hodges. (b)*

Mr. Selwyn and Mr. F. Webb, for the plaintiffs. — We say that the existence of the leases gives the purchaser no right to rescind the contract, or to have compensation. We admit that it would be fatal to our case if the contract had been so worded as to entitle the purchaser to say that he bought an estate in possession; but it is clear that he did not; he had full notice from the particulars and conditions of sale that he was buying a property in the occupation of tenants, and he buys subject to the leases such as they are. The doctrine in *Sugd. Vend. & Purch. (c)* applies here, assuming that there was originally a misrepresentation, which we deny: "If a vendee proceed in the treaty for purchase without objecting after he is acquainted with the nature of the tenure, he will be bound to complete his contract and cannot claim any compensation." Here the purchaser proceeded for a long time after full information of * the leases without taking any objection * 311 in respect of them, and at last, when all other objections had failed, he set up this. *Flint v. Woodin (d)* shows that the objection ought to have been taken sooner. The appellant was put upon inquiry by notice of the leases, and ought to have ascertained their nature by applying to the tenants. *Hall v. Smith, (e)* *Knight v. Bowyer. (g)* The fact that the common decree only was made cannot prejudice us; we could not be bound to ask for a declaration that the purchase was to be taken subject to the leases, when no objection had ever been raised in Court or out of Court in respect of them. The purchaser here made inquiry, and cannot complain of misrepresentation. It would be impossible ever to prosecute with success a specific performance suit as to a large property, if every existing lease, upon which the best rent is not reserved, were to be considered an objection to the title. At most it is only a matter for compensation.

Mr. Craig, in reply. — The plaintiff's argument as to the effect of notice assumes that he is entitled to specific performance of the agreement with a parol variation, which cannot be. *Gunnis v.*

(a) 15 Beav. 183.

(b) 5 Sim. 227.

(c) Page 252 (13th ed.).

(d) 9 Hare, 618.

(e) 14 Ves. 426.

(g) 2 De G. & J. 421, 449.

Erhart, (a) *Boydell v. Drummond*. (b) *Collier v. Jenkins* (c) shows that a lease for life at a low rent is an objection to the title. The plaintiffs are bound by the decree, and the only question it leaves open is whether there is a good title. The case is one in which we are not bound to complete with compensation. *Shackleton v. Sutcliffe*, (d) *Perkins v. Eade*. (e)

* 312 [* The purchaser's counsel ultimately stated that he desired to take the title with compensation.]

Judgment reserved.

November 25.

The Lord Justice KNIGHT BRUCE, after stating the facts, proceeded as follows :—

The appellant says that at present the title (whatever may have been its former condition) is objectionable only on the ground of some leases for lives still in existence (leases dated respectively in 1803, 1810, and 1814), and mentioned in the earlier certificate, which affect and comprise portions of the property agreed to be purchased; on account of these he claims compensation, not seeking to reject the purchase. The plaintiffs, the vendors, however contend that the defendant is bound to complete the purchase without receiving any compensation, founding themselves, in part at least, on the language of the written contract directed to be specifically performed, which, in describing the property, or part of it, has the words "now or late in the several occupations of Hugh Roberts and others." And the plaintiffs say that inasmuch as before and at the time of the sale parts of the property were occupied by Hugh Roberts and others under leases for lives, including or consisting of the leases for lives already mentioned to be now subsisting, and as the word "rents" is in the contract, the language of the contract precludes the objection. My opinion, however, is otherwise. It appears to me that for this purpose the language of the contract is not sufficiently clear, precise, or definite, and that, as far as its expressions are concerned, the objection

(a) 1 H. Blackst. 289.

(d) 1 De G. & Sm. 609.

(b) 11 East, 142.

(e) 16 Beav. 193.

(c) 1. Younge, 295.

upon the ground of the leases for lives is open to the defendant. But the plaintiffs assert against him that, independently of those expressions, he was aware, before and when he signed the contract, of * the existence of leases for lives affecting * 813 parts of the estate, and conducted himself after he had signed it, in such a manner as to show that he meant not to insist on the objection, but to waive and abandon it. What would have been the effect of this notice, if any, and of this conduct, if there was such conduct, had the claim or one of the decrees or decretal orders been differently worded, I need not give, and I abstain from giving, any opinion. But as the claim and the decrees or decretal orders are expressed, I think that neither the notice to the defendant, if any, previous to the agreement, nor his conduct, contended to show waiver and abandonment, has any such bearing on the question of title or of specific performance as to render him liable to have a bad or defective title forced on him without compensation. I consider him accordingly entitled to compensation upon account of the existing leases for lives, and to have the two orders under appeal discharged. If the parties, without prejudice to their respective rights of appeal to the House of Lords, shall join in wishing us to fix the amount of compensation, we will endeavour to do so. If not, the matter must, I suppose, go back to Chambers. I do not, at present, see how interest on the reduced purchase-money can be given against the defendant from any period anterior to June, 1860. If it shall not be, then the account of rents will be from no earlier time. The purchaser, as I understand, has not been in possession. We must deal with the costs also.

The Lord Justice TURNER, after stating the nature of the appeal, and reading the particular of sale, proceeded as follows :—

This description of the property, in my opinion, imports that the vendors purported to sell an estate in fee-simple in possession. There is not on the face of the * particulars any * 814 qualification of the interest in the estate purported to be offered for sale, and it was, as I conceive, the vendors' duty to qualify upon the face of the particulars the interest which they intended to sell, if they did not intend to offer for sale an unqualified estate in fee. Under these particulars of sale, therefore, the

vendors were, in my opinion, bound to prove a title to an unqualified estate in fee, but this they have failed to do, for part of the property appears to have been out upon leases for lives, which were subsisting at the time of the sale and are still subsisting. It was attempted on the part of the vendors to get rid of this objection by referring to the conditions of sale, by one of which it is provided that upon the purchase being completed the purchaser is to be let into the receipt of the rents and profits of the premises, and therefore it was said that the purchaser here had full notice that he was not buying an estate in fee-simple in possession, but merely an estate from which he was to derive rents and profits. But rents and profits must mean ordinary rents and profits, and not merely nominal rents reserved upon leases for lives, and if the vendors meant these words "rents and profits" to have any other than their ordinary meaning, it was upon them to have expressed upon the face of the conditions of sale the meaning which they intended the words to import. I have no doubt, therefore, that the first certificate in this case properly found that a good title could not be made to these portions of the property which were out upon the leases for lives. But the certificate has gone on to find that these portions of the property were known by the purchaser at the time of the contract for purchase to have been subject to these leases for lives. Now there are two points to be considered with reference to that finding. In the first place, was

that finding upon a matter falling within the reference to * 315. Chambers? and, secondly, was it correct in * substance?

It clearly was not within the reference to Chambers. What was referred to Chambers was, to ascertain whether a good title could be made to the property, and not whether there had or had not been knowledge on the part of the purchaser of the title being insufficient as to particular portions of the property. I should, however, have felt unwilling to dispose of the case upon that mere formal ground, more especially as I apprehend that the matter came under the personal consideration of the Master of the Rolls in Chambers. I have, therefore, attentively examined the evidence, and I am of opinion that it does not support the finding that the purchaser, when he bought this property, bought with knowledge that the property was subject to the leases for lives. The consequence, therefore, is, that the finding, whether right in form or not, is wrong in substance; and the order refusing to vary

the certificate ought, therefore, in my opinion, to be discharged, and an order made to vary the certificate by striking out the part which finds the purchaser's knowledge at the time of the contract for sale. We then come to the order made by the Court on further consideration. The case then stands thus: Upon the certificate varied according to the opinion I have expressed upon it, that there is no title to part of the property which was the subject of the contract for sale, the question is, What is right to be done in that state of circumstances? The purchaser has elected before us to take the property with compensation. He has a right to do so, unless he has precluded himself from that right, for, generally speaking, every purchaser has a right to take what he can get, with compensation for what he cannot get.¹ The question, therefore, upon this part of the case is, whether the purchaser has or has not by his conduct debarred himself from the right to have compensation in respect of these leases for lives. I am of opinion that he has not. *I cannot find any sufficient * 316 evidence, if, indeed, there is any evidence at all, that the purchaser knew of the leases for lives before the month of May, 1857, and I doubt whether he is fixed with knowledge of them at that time, though he then knew that there were leases of some kind affecting these parts of the property. But assuming that he did know of the leases for lives at that time, it is clear from a letter written by the purchaser's solicitor to the solicitors of the vendors, in October, 1857, that an objection had been taken in respect of them, and had not at the time of writing that letter been waived. It would be a strong decision to say, that waiver of the objection ought to be implied from the lapse of time between that period and the 5th of March following, on which day the claim was filed, and I cannot find any evidence that there was in fact such waiver. I do not indeed find that the leases were again specifically mentioned during that interval, but there is abundant evidence of the purchaser's continuing to insist that his requisitions had not been answered. The vendors might perhaps understand this as referring only to the formal written requisitions,

¹ See Fry Specif. Perfor. (2d Am. ed.) 447, § 791 *et seq.*; 3 Lead. Cas. in Eq. (3d Am. ed.) 72, 73 [459], [460], 89, 90; Clark v. Reins, 12 Grattan, 98, 113; Waters v. Travis, 9 John. 450; Voorhees v. De Meyer, 3 Sandf. Ch. 614; Springle v. Shields, 17 Ala. 295; Bass v. Gilleland, 5 Ala. 761; Ketchner v. Short, 20 Ohio, 453; 2 Dart V. & P. (4th Eng. ed.) 979.

which did not refer to the leases, as their existence was not known to the purchaser when the written requisitions were delivered. As, however, an objection had been taken in respect of the leases, I think we cannot thus limit the objections on which the purchaser continued to insist. I am of opinion, therefore, that though the purchaser's conduct may have been, and probably was, such as to prevent his getting rid of the purchase, it was not such as to preclude him from compensation, and that the order on further consideration cannot be maintained.

The question has been raised in argument, whether the point of waiver of right to compensation was open upon the pleadings. I do not intend to give any concluded opinion on this question, but it appears to me that waiver of compensation may stand on a different footing from waiver of objections to title. The question may stand thus: Suppose the usual reference as to title to have been directed, the pleadings raising no other question than that of title, and a certificate to be made finding that no title is shown to a part of the property. The Court has then to decide whether the contract is thereby put an end to. If the part to which no title is shown is not material to the enjoyment of the rest, the Court holds that the contract is not put an end to, and it has then to do justice between the parties. The justice of the case may be to decree specific performance, with compensation if the right to compensation has not been waived, but without compensation if the right to it has been waived, and thus the question of waiver may be let in, though not raised by the pleadings. It is, however, in my opinion, unnecessary to decide this point, as the case of waiver of compensation appears to me wholly to fail on the evidence.

The certificate of June, 1860, will therefore be varied by omitting the part which finds that the purchaser knew of the existence of the leases. The two orders will be discharged, and a reference to ascertain the amount of compensation directed.

* BENHAM v. KEANE.

* 318

1861. November 4, 5, 6, 25. Before the LORDS JUSTICES.

The priority as against lands in Middlesex of a judgment registered in the Middlesex registry over a judgment which, though earlier in date, is later in order of registration on the Middlesex registry, is not lost by reason of the judgment creditor's having notice of such earlier judgment at the time when his judgment is entered up.¹

THIS was an appeal by Mr. Beavan, a judgment creditor of the late Lord Mornington, from a decision of the Vice-Chancellor Sir W. P. WOOD as to the priorities of incumbrances on some property of Lord Mornington in Middlesex.

The several incumbrances, as ascertained in the suit, which was a suit by another judgment creditor to enforce his judgment, were as follows :—

1. Mr. Beavan's judgment, entered up on the 29th of October, 1836. It was registered in the Common Pleas on the passing of 1 & 2 Vict. c. 110, and had from time to time been duly re-registered. It was not registered in the Middlesex registry till the 10th of November, 1857.

2. Robins's judgment, entered up and registered in the Common Pleas on the 15th of April, 1846, but not re-registered till March, 1858. It was registered in Middlesex on the 16th of May, 1846. This judgment was assigned to a trustee for the plaintiff on the 27th of February, 1858.

3. Smith's judgment, entered up on the 1st of May, 1846, registered in the Common Pleas on the 19th of June, 1846, and subsequently from time to time duly re-registered. Registered in Middlesex on the 5th of July, 1851.

4. The plaintiff's judgment, entered up and registered in the Common Pleas on the 24th of May, 1847, and from time to time duly re-registered. Registered in Middlesex on the 4th of January, 1848.

¹ See 2 Sugden V. & P. (8th Am. ed.) 532-535, 537, 728, and notes; 1 Dart V. & P. (4th Am. ed.) 422, 442, 446; 2 ib. 780, 781; Rolland v. Hart, L. R. 6 Ch. Ap. 678.

* 319 * 5. Daniel Keane's mortgage, dated the 24th of August, .. 1847, and registered in Middlesex on the following day. Subsequently, on the 16th of February, 1850, this mortgage was transferred to David D. Keane, in trust for Daniel Keane, and by a deed of even date the equity of redemption was conveyed to Daniel Keane.

6. A sub-mortgage of Daniel Keane's interest in this property made to Landon and D: D. Keane on the 24th of December, 1853.

Daniel Keane, when he took his mortgage, had notice of Beavan's judgment, and it was contended that Robins, the plaintiff, and Landon and D. D. Keane also had notice of it at the times when they respectively entered up their judgments and took their security.

The chief clerk certified the priorities according to the dates of the Middlesex registrations. Mr. Beavan and Landon and D. D. Keane took out summonses to vary this certificate.

The Vice-Chancellor held: (1) That notice was immaterial as between judgment creditors, and that the plaintiff therefore, in respect of his own judgment and that of Robins, did not lose, by reason of notice, the priority over Beavan to which he was entitled by prior registration in Middlesex; (2) That Keane having taken his security with notice of Beavan's judgment must be postponed to Beavan; (3) That Landon and D. D. Keane had priority over Robins, by reason of Robins's omission to re-register; (4) That if the proceeds of the estate were not more than sufficient to satisfy the two judgments belonging to the plaintiff, Beavan must be postponed to Landon and D. D. Keane.

* 320 * His Honor therefore settled the order of priority as follows:—

1. The plaintiff's own judgment.
2. Landon and D. D. Keane's mortgage.
3. Robins's judgment belonging to the plaintiff.
4. Beavan's judgment.
5. Daniel Keane's interest.

But this was to be without prejudice to any questions between the plaintiff, Landon, and D. D. Keane, and Beavan, with respect to Landon and D. D. Keane's mortgage debt, in case the proceeds

of the estate should be more than sufficient to satisfy the two judgments belonging to the plaintiff. (a)

Mr. Beavan appealed from this decision, contending that all the subsequent judgment creditors had notice of his judgment at the times when theirs were entered up, and that he therefore was entitled to rank as the first incumbrancer.

The Solicitor-General (Sir R. PALMER) and *Mr. Cole*, for the appellant. — Mr. Beavan's judgment was registered in the general register before any of the other incumbrances were in existence, but it was not registered in Middlesex until after they had all been registered there. All the other incumbrancers, however, had notice of his incumbrance. The Vice-Chancellor considered that a purchaser was affected by notice of a judgment though not registered in Middlesex, and that Daniel Keane must therefore be postponed to Beavan, as in *Proctor v. Cooper*, (b) but he held that notice of a prior judgment has no effect on a judgment creditor, the result of which is that Beavan * must be postponed * 321 to all the incumbrancers except Keane. This is a new doctrine. We contend that the conscience of the subsequent judgment creditor is affected by notice of a prior judgment, just as much as by notice of a prior charge arising *ex contractu*: *Lee v. Green*; (c) the judgment having given Mr. Beavan an interest of exactly the same nature as if Lord Mornington had, by writing, agreed to charge the land. The principle which the Vice-Chancellor has propounded is, that a judgment creditor with notice is in a better position than a purchaser with notice. This must be considered both on the statutes and on the authorities. Compare 4 & 5 Will. & Mary, c. 20, § 3, and 7 Anne, c. 20, § 18. There is nothing in the statutes to show that they are to be construed more favourably for subsequent judgment creditors than for subsequent purchasers. Now to look at the case upon the authorities. The general principle as to the effect of notice in cases of this nature is laid down in *Le Neve v. Le Neve*, (d) where Lord HARDWICKE says: "Now if a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, *machinatur ad circumveniendum*; and it is a maxim too in our law that *fraus et dolus memini patrocinari debent*." In

(a) 1 J. & H. 685.

(c) 6 De G., M. & G. 155.

(b) 2 Drew. 1; 1 Jur., N. S. 149.

(d) 3 Atk. 655.

Davis v. Strathmore, (a) which arose under the Docketing Act, Lord ELDON refers to the cases under the Registry Acts as analogous, and his observations show that he saw no difference between the cases of a prior purchaser and a prior judgment creditor. A purchaser has no equity against a prior judgment creditor of whose judgment he had notice: he did not deal for the land on the footing that there was no judgment. *A fortiori*, a judgment creditor has no equity against a prior judgment creditor of whose judgment he had notice, for * he gets a charge only on what remains in his debtor. A judgment creditor becomes an incumbrancer on what he can get; he takes the estate as he finds it. His charge extends only to what the debtor could honestly have sold to a purchaser, and what the purchaser could have kept. Here a judgment creditor has been held to acquire a valid charge on what a purchaser, knowing the circumstances, could not have kept. A judgment, though not registered in Middlesex, is not null, but gives an inchoate title, which a person having knowledge of it is not at liberty to disregard. *Tunstall v. Trappes (Gosling's Case)* (b) proceeds on the proposition laid down by Lord ELDON, that no person claiming under a judgment debtor with notice of the judgment can defeat the judgment. The principle is that a judgment is a charge which no one having notice of it can, in equity and good conscience, disregard. Sugd. Vend. & Purch. (c) The Statute 1 & 2 Vict. c. 110, § 13, contains nothing to put a prior judgment creditor in a worse position than he was in before the passing of that Act; it would seem rather to put him in a better position, for it gives him an interest of the same nature as if it had arisen from contract. The decisions on this section have determined two points: first, that the section does not turn a judgment creditor into a purchaser, so as to enable him to defeat a voluntary settlement, *Beavan v. Lord Oxford*; (d) secondly, that the judgment only operates upon what is, in the view of a Court of equity, the debtor's property; that which he could dispose of without wronging any other person, *Whitworth v. Gaugain*; (e) so that the interest of the judgment creditor is substantially the same as if the debtor had given him

(a) 16 Ves. 419.

(d) 6 De G., M. & G. 507.

(b) 3 Sim. 301.

(e) 1 Phil. 728.

(c) Page 661 (11th ed.).

a charge by a writing, mentioning every existing charge and lien on the property. Now it has * been urged that * 323 we must impart into this section that a judgment is not to take effect under it in a register county until registration. The statute contains nothing to that effect. The decisions at law, *Doe v. Alsop*, (a) *Westbrooke v. Blythe*, (b) and *Hughes v. Lumley*, (c) are immaterial, the point being a purely equitable one. The only case raising a *prima facie* difficulty in our way is *Johnson v. Holdsworth*. (d) The decision there is difficult to be supported; but it goes no further than this, that the judgment creditor, who had not registered at all in the county, had no such direct interest in the land as to make him a necessary party to a suit by a person having a title paramount to his. The Court is very much disposed to dispense with the presence of puisne judgment creditors in a foreclosure or redemption suit. *Robinson v. Woodward* (e) shows the effect of notice. As between Beavan and Landon, how is it made out that Beavan has lost his priority; the only case being that there are two persons, Robins and the plaintiff, who have rights against one of them, but not against the other? The plaintiff has been put above Robins, because the plaintiff is above Landon, and Landon is above Robins. If, then, the property is enough to pay the plaintiff and Landon, no further question can arise. Beavan comes before Landon, and if there be any privity between them, then, out of what is coming to Landon, Beavan must be paid.

Mr. Rolt, *Sir H. M. Cairns*, and *Mr. Southgate*, for the plaintiff.—There are three points in the case: 1. Does an unregistered judgment affect land in Middlesex as against * anybody? 2. If an unregistered judgment in Middlesex * 324 is good against a person taking with notice, we contend that it can only be so as against a person taking by contract and not as against a judgment creditor. 3. If a judgment creditor can be considered as a person claiming by contract for this purpose, notice will be ineffectual, unless he had it by the time when he advanced his money.

On the first point the words of the 18th section of the Middlesex

(a) 5 B. & Ald. 142.

(b) 3 El. & Bl. 737.

(c) 4 El. & Bl. 274.

(d) 1 Sim., N. S. 106.

(e) 4 De G. & Sm. 562.

Registry Act seem quite clear, if taken by themselves apart from the authorities. If the forms are not complied with there is no judgment affecting the lands, and such was the opinion of Lord ELDON. *Davies v. Lord Strathmore*. (a) The decision in *Johnson v. Holdsworth* (b) is to the same effect. *Tunstall v. Trappes* (c) was decided on the construction of a different statutory provision, and on the assumption that it was governed by *Le Neve v. Le Neve*. There is a distinction between the Middlesex Registry Act and the Docketing Acts. If an enactment is, that an instrument shall be void against particular persons, if certain forms, the object of which is the giving of notice, are not complied with, a person who has notice is bound, though they are not complied with; but the case stands on quite a different footing if the enactment is, that the lands shall not be affected at all if the forms are not complied with. Now the Docketing Act, 4 & 5 W. & M. c. 20, contains no provision that an undocketed judgment shall not affect the land, but only that it shall be void as against certain persons, but the Middlesex Registry Act does. Lord REDESDALE in *Bushell v.*

Bushell (d) draws this distinction, in observing on the * 325 difference between the English and * Irish Registry Acts.

The preamble of the Middlesex Act supports the view for which we contend. In cases falling under the 16th section of the Statute of Frauds, Courts of Equity have declined to interfere on the ground of notice. *Robinson v. Woodward* (e) did not turn on the Registry Act, but on 1 & 2 Vict. c. 110; Sugd. Vend. & Purch. (g)

If, however, *Tunstall v. Trappes* be considered as laying down sound law, we say that the doctrine does not apply to a subsequent judgment creditor, but only to a person taking by contract. The reason why notice affects a purchaser is, that he is privy to a fraud by his vendor; he contracts with the vendor for what he knows that the vendor cannot in good conscience give him. But a judgment creditor stands on quite a different footing: he claims against, not through, his debtor, and there is nothing attaching on his conscience so as to deprive him of the benefit of the provisions as to registry. A purchaser by virtue of his contract comes into the position of his vendor, and is in no better situation than he,

(a) 16 Ves. 419.

(b) 1 Sim. N. S. 106.

(c) 8 Sim. 301.

(d) 1 Sch. & Lef. 90.

(e) 4 De G. & Sm. 562.

(g) Page 431 (13th ed.).

except so far as he may protect himself by reason of want of notice: a judgment creditor comes to take what the law will give him.

The Stat. 1 & 2 Vict. c. 110, does not place a judgment creditor in the position of a mortgagee by contract. *Beavan v. Lord Oxford*, (a) *Hawkins v. Gathercole*, (b) *Eyre v. M'Dowell*. (c)

Mr. Willcock and *Mr. De Gex*, for Landon and Keane. — In a case like *Le Neve v. Le Neve*, the second purchaser combines with the vendor to defeat the right of * the first purchaser to the specific thing contracted for. This is a fraud, and that is the ground on which the cases put it. *Jolland v. Stainbridge*, (d) *Wyatt v. Barwell*. (e) The case of a judgment creditor is wholly different; he does not bargain for a security on any specific thing; he may not even know of the existence of the particular estate at the time when he enters up his judgment. There is, therefore, nothing to affect his conscience so as to deprive him of the benefit of the provisions of the statute.

Mr. Archibald Smith, for Daniel Keane.

The Solicitor-General, in reply. — The absence of a preamble in the second Middlesex Act is in my favour, for it shows that the policy of the second Act was not different from that of the first. The object of the Act was to enable persons dealing with the land to obtain notice of prior dealings with it; and the cases decide that its policy is not to avoid altogether instruments which do not comply with its provisions as against persons who have notice of them. The remarks of Lord ELDON in *Davis v. Earl of Strathmore* (g) do not bear the construction which the respondents put upon them. He cannot have meant to say that the case before him must have been decided the other way under the Registry Acts. His words are somewhat obscure, but his meaning is sufficiently plain, that he considered it established by the authorities that actual notice took away the effect of an omission to register in Middlesex, and that he felt the importance of having a similar rule as regarded the effect of notice where there had been an omission to docket. There is no reason why notice * should * 327

(a) 6 De G., M. & G. 507.

(b) 6 De G., M. & G. 1.

(c) 9 H. L. Cas. 619.

(d) 3 Ves. Jr. 478.

(e) 19 Ves. 435.

(g) 16 Ves. 419.

have less effect under the Registry Acts than under the Docketing Act, the words of the Docketing Act as regards purchasers being quite as strong as those of the Registry Act. The Vice-Chancellor of England, in *Tunstall v. Trappes*, rightly treated *Davis v. Earl of Strathmore* as in point, and his decision is referred to with approbation in *Neate v. Duke of Marlborough*. (a) Then as regards the difference between a judgment creditor and a purchaser, the Stat. 1 & 2 Vict. c. 110 altered the position of the judgment creditor and made a judgment a specific incumbrance. *Rolleston v. Morton*. (b) The provisions of this Act are not to be mixed up with the Registry Act by importing into the former, after the words "as if he had by writing agreed to charge the same," the words "and such charge had been duly registered." Such an interpolation is absurd and unnecessary. The two statutes run well together. The subsequent judgment creditor who registers first having notice of the prior judgment, the question is, whether he has not notice of such an interest in the land as he is not at liberty to disregard. *Robinson v. Woodward* (c) clearly involves a decision of the question, for the issues would not have been directed if not material. In *Newlands v. Painter* (d) a judgment creditor was not allowed to take in execution property which in equity belonged to the wife, though the legal interest was in the husband. This was applying the principle against a judgment creditor. No matter whether the dealing is by way of contract or not, notice of another person's title to the property is the point. What difference is there between a judgment creditor and a purchaser in favour of the former? A purchaser has a right to buy what belongs to the vendor; a judgment creditor has a right

* 328 to take * all that belongs to his debtor, but no more. It has been urged that notice must be given before the money is paid. No doubt if a person contracts for a specific property, and pays his money, without notice, he may afterwards get in the legal estate and protect himself by it. But a judgment creditor does not advance his money on the faith of having a specific interest in the property. The argument for the respondents on this point is a revival of the argument which failed in *Whitworth v. Gaugain*. Suppose a person purchased partly in consideration of a pre-existing debt, surely notice would affect him if he had it

(a) 3 Myl. & Cr. 407, 416.

(c) 4 De G. & Sm. 562.

(b) 1 Dru. & War. 195.

(d) 4 Myl. & Cr. 408.

before the purchase, though he had it not at the time when the debt was originally contracted.

Judgment reserved.

November 25.

THE LORD JUSTICE TURNER. — The question on which we reserved our judgment in this case, and which we have now to dispose of, is, whether the defendant, Beavan, a judgment creditor of the late Lord Mornington, is, as to a freehold house in Saville Row, in the county of Middlesex, of which the late lord was seised in fee, entitled to priority over the plaintiff, who is also a judgment creditor of the late lord, and the assignee of another judgment against him obtained by Mr. L. T. Robins. The judgment of the defendant Beavan is long prior in date to the judgments of the plaintiff and of Robins. It was duly entered upon the register of the Court of Common Pleas, and has, from time to time, been duly re-registered in that Court; but it was not entered upon the register of the county of Middlesex until long after the judgments of the plaintiff and Robins had been entered upon that register. Robins, however, when he obtained his judgment and entered it * upon the Middlesex registry had notice of the defend- * 329 ant Beavan's judgment. It was not disputed and could not be denied that, independently of this notice, the plaintiff's judgment and Robins's judgment would, by virtue of the Middlesex Registry Act, be entitled to priority over the defendant Beavan's judgment. It is, therefore, upon the notice the question of priority depends, and it being necessary to determine the effect of the notice in settling the priority of Robins's judgment, it may be convenient to assume for the present that the plaintiff stands as to notice upon the same footing as Robins. The Vice-Chancellor Sir WM. PAGE WOOD, upon appeal from whose judgment this question comes before us, has been of opinion that the notice was immaterial, and that the defendant Beavan was not therefore entitled to the priority claimed by him. I am also of opinion that, as between these parties, notice was not material, and I agree, therefore, in the Vice-Chancellor's conclusion.

It may be well, in the first place, to consider the case with reference to the rights of a prior and subsequent judgment creditor, independently of the statutory provisions for the docketing and

registry of judgments, and independently also of the Statute 1 & 2 Vict. c. 110. A judgment creditor had, under the Statute of Westminster the 2d, a right to take in execution a moiety of his debtor's lands; and purchasers or mortgagees of the lands, subsequently to the judgment, took them subject to that right. Judgment creditors had thus a lien on the lands of their debtors. They had a right to seize and hold them for the payment of their debts, but this lien was general and not specific. The judgment debts might be satisfied out of the personal estate of the debtors, and the land might not be resorted to at all, or some lands might be resorted to and others not. It was a lien too which was common to all

* 330 the judgment creditors of the * same debtor. The existence of a prior judgment could not prevent a subsequent judgment creditor from issuing execution against his debtor's lands; and if he took them in execution he could hold them at law, at least until the prior judgment creditor proceeded at law under his judgment to recover them, and even after such recovery he would still, as I apprehend, have a right at law subject to the right of the prior judgment creditor. Could then a Court of Equity be called upon to interpose in favour of the prior judgment creditor? To postpone the subsequent judgment creditor in equity upon the ground of his having had notice of the prior judgment would, as it seems to me, be to deprive the former of the fruit of his legal diligence in favour of the latter, who has failed to exercise that diligence, — a course which a Court of Equity, so far as I am aware, has never adopted. When, therefore, the statutory provisions for the docketing and registry of judgments were introduced, there was not and could not be, as I conceive, any right on the part of a prior judgment creditor to call upon a Court of Equity to give him priority over a subsequent judgment. If he could gain advantage at law by first issuing execution, of course he would keep that advantage, but if he could not, I can see no ground on which he could be entitled to call upon a Court of Equity for its aid. I have not, of course, forgotten that in the case before us there was no *elegit* upon any of the judgments, but there was a legal right to issue execution, and with such a legal right a Court of Equity could not, as I apprehend, in the view which we are now considering, have, in any way, interfered. There is no instance, so far as I am aware, of its having done so or even been called upon to do so. This, as it seems to me, must have been the position of a case

of this description before the introduction of the statutory provisions for docketing and registering judgments.

* Then what was the effect of those statutory provisions ? * 331
It is not necessary for us now to consider the effect of the Docketing Act, but undoubtedly the Middlesex Registry Act, with which alone we have now to deal, took away as to lands in Middlesex any legal priority or right to priority of an unregistered judgment, by enacting that no judgment should bind the land until it was registered. The circumstance of the legal priority or right to priority being thus taken away certainly could not give the right to priority in equity, although it might not take away that right if it existed before, and the argument, therefore, is reduced to this, that there was such an equitable right before the introduction of these statutory provisions. It may be remarked in passing, that, if this was the case, it is most singular that, having regard to the purpose of these statutes, no trace of it is to be found in any of them, and no instance is found, either before or since the statutes, of the interference of Courts of Equity with the priorities of judgment creditors ; but it was argued that such interference was due upon the principles of equity, — that, according to the settled doctrine of the Court, purchasers and mortgagees are bound by notice of a judgment not docketed, and, as it was said, also by notice of a judgment not registered, and it was insisted that this doctrine applies between different judgment creditors as much as between judgment creditors and purchasers or mortgagees. Whether purchasers or mortgagees of lands in Middlesex are or are not bound by notice of an unregistered judgment, is a question which was much discussed in the course of the argument before us. With respect to this question it may be right to say, that looking not merely to the case of *Le Neve v. Le Neve*, (a) but to the authorities referred to in it, and to the case of *Davis v. Earl * of Strathmore*, (b) as to which, having regard to what * 332 had been decided, it cannot, I think, be doubted what the opinion of Lord ELDON was, and looking also to the cases of *Tunstall v. Trappes*, (c) and *Robinson v. Woodward*, (d) I should hesitate very long before venturing to intimate any doubt upon the

(a) 3 Atk. 655 [2 Lead. Cas. in Eq. (3d Am. ed.) [23] 127 *et seq.* and notes].

(b) 16 Ves. 419.

(d) 4 De G. & Sm. 562.

(c) 3 Sim. 301.

point, but I do not think it is necessary for us to decide the question. Assuming that purchasers and mortgagees are so bound, we must, before we venture to apply the same rule between different judgment creditors, consider the different positions of purchasers and mortgagees and of judgment creditors, and consider also whether the principles which have governed the decisions as to the one class do or do not apply to the other. Judgment creditors are certainly not purchasers¹ or mortgagees within the meaning of the Registry Act, and when we look to the principle on which purchasers and mortgagees are held to be bound by notice of an unregistered judgment, it appears to be this, that the purchaser or mortgagee having either a mere equitable title, or no title at all, is using the equitable title, or assuming a title, against equity. He is willingly aiding and abetting the judgment debtor to take out of the reach of the judgment creditor that against which he knows that the judgment creditor has a legal right; and a Court of Equity holds, and most justly holds, that it is against conscience that he should do so: but how differently does the case stand as between two judgment creditors! The subsequent judgment creditor has not a mere equitable, but a legal right. He takes, it is true, what the other judgment creditor might have taken, but he takes it in exercise of a legal right. He takes it under legal process adversely to the debtor, and he gets it only because the prior

* 333 judgment creditor has * neglected to take it. It seems to me, therefore, that the principles which apply between judgment creditors and purchasers and mortgagees do not reach the case between different judgment creditors, and are not applicable as between them. I may add, that there would, as it seems to me, be the greatest possible inconvenience in any such extension of the doctrine of the Court. If the Court was to give priority to an undocketed or unregistered judgment creditor over a subsequent judgment creditor upon the ground of notice, it could not, so far as I can see, stop at that point. It would be its duty to interfere by injunction to restrain the subsequent judgment creditor from issuing execution upon his judgment, and nobody, so far I am aware, has ever thought that a bill for this purpose could be maintained on such a case, nor is there, so far as I am aware, precedent for such interference. The equitable rights of judgment creditors

¹ Attaching creditors are to be considered as purchasers for a valuable consideration. *Per Jackson J. in Lanfear v. Sumner*, 17 Mass. 113.

were fully considered and explained by Lord COTTENHAM in *Neate v. Duke of Marlborough*, (a) and no suggestion is to be found in that case of any such equity as is claimed by this appeal.

It was said, however, that *Neate v. Duke of Marlborough* was decided before the Statute 1 & 2 Vict. c. 110, and that that statute has altered the rights of judgment creditors and has converted the judgment into a charge, but what the appellant has to make out is, not only that the statute has converted a judgment into a charge, but that it has converted it into such a charge as would carry with it all the consequences incident in this Court to notice of a charge; that this statute was not only intended, as Lord CRANWORTH says in *Johnson v. Holdsworth*, (b) to repeal the Registry Acts by a side wind, but was intended also to alter the law of this

* Court, and even, as it seems to me, to extend its jurisdiction, * 334 for this would be the effect of the statute upon the wide construction contended for by the appellant, inasmuch as questions with which before the statute the Court had no concern would then be brought within its cognizance. I am satisfied that this was not the intention of the statute,¹ and I think it bears upon the face of it proof that it was not so intended, for not only is it wholly silent as to priorities, but, as I read it, it does not even go so far as to make one judgment binding as against another, the enactment being only that judgments shall bind the debtors and all persons claiming under them. It is true that the statute has been spoken of as having converted judgments into equitable mortgages, but I do not understand this to mean that it has done so for all purposes, and I am satisfied that it has not done so for any purpose which can assist the appellant in this case. Upon the whole, therefore, my opinion is, that this appeal must be dismissed, but as the question is new, and not free from difficulty, I think it should be dismissed without costs.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

(a) 3 Myl. & Cr. 407.

(b) 1 Sim., N. S. 106.

¹ See 1 Dart V. & P. (4th Eng. ed.) 449.

* 335 * In the Matter of The DISTRICT SAVINGS BANK
(LIMITED);

AND

In the Matter of The JOINT-STOCK COMPANIES ACTS,
1856 and 1857;

AND

In the Matter of The JOINT-STOCK COMPANIES AMEND-
MENT ACT, 1858;

AND

In the Matter of the Act 21 & 22 Vict. c. 91 (An Act to enable
Joint-stock Banking Companies to be formed on the principle of
Limited Liability).

Ex parte COE.

1861. December 7, 9. Before the LORDS JUSTICES.

A company called "The District Savings Bank," was registered in 1858 under the Joint-stock Companies Act, 1856, with limited liability, but was never registered under the Acts of 1857 and 1858 relating to banking companies, and its shares were of 1*l.* each. Its objects were to receive deposits, to grant loans on security, and to conduct the business of emigration agents. Money could not be drawn out by checks payable on demand, but could only be withdrawn after notice, and the company kept banking accounts with two banks in London. *Held*, that it was not a banking company within the meaning of the Acts relating to such companies, and that the Court of Chancery had no jurisdiction to make an order for winding it up.

THE association called the District Savings Bank (Limited), was formed in August, 1848. The memorandum of association filed on the 31st of that month stated the objects of the association to be these:—

"First. Savings-bank department. To receive deposits from one penny to ten pounds.

"Second. Investment department. To receive deposits from ten pounds and upwards.

"Third. Loan department. To grant loans on real and other securities.

"Fourth. Emigration department. To conduct the duties of general emigration agents."

The capital was divided into shares of 1*l.* each.

* On the 8th of September, 1858, the company obtained * 336 a certificate of registration under the Joint-stock Companies Act, 1856.

The evidence showed that the course of business in the savings-bank department was to receive deposits and allow the depositors interest upon them, and that the deposits could not be withdrawn without seven days' notice. That in the investment department, in which larger sums were received, the sums deposited might be withdrawn on notice, the length of notice varying according to the amount deposited. No checks payable on demand could be drawn upon the company. The company kept a banking account with the Bank of England, and also with a joint-stock bank.

The company having become insolvent, a shareholder presented a petition for winding it up in bankruptcy, and an order for that purpose was made on the 10th of October, 1861, by Mr. Commissioner FANE. The present petition was presented to obtain an order for winding it up in Chancery, on the ground that the Court of Bankruptcy had no jurisdiction, and it was heard by their Lordships in the first instance at the request of Vice-Chancellor Wood, to whose Court it was attached.

Mr. Cottrell, for the petition. — An association like the present comes within the statutory meaning of a banking company. 9 Geo. 4, c. 92, § 2. The Act of 1856, 19 & 20 Vict. c. 47, does not apply to banking companies, which, by its 2d section, are expressly excluded from its operation. The 60th section of that Act provides, that a limited company not engaged in working a mine is to be wound up in bankruptcy, and all other registered companies in * England, except mining companies, in Chancery. * 337 The Act of 1857, 20 & 21 Vict. c. 49, § 3, repeals the 2d section of the former Act, subject to this proviso, that a banking company should not be registered as a limited company; so far, therefore, a banking company must be wound up in Chancery. The Joint-stock Banking Companies Act of 1858, 21 & 22 Vict. c. 91, repeals the last-mentioned proviso, and the 5th section provides, that limited joint-stock banking companies shall be wound up in the same manner and under the same jurisdiction in and under which joint-stock banking companies other than limited are required to be wound up by the Act of 1857. The Court of Chan-

entitled under the will of Richard Ness to one undivided eighth only of the estates thereby devised, and the plaintiff to the remaining seven-eighths.

Richard Ness, the testator under whose will the question arose, had two daughters, Elizabeth and Faith. His daughter Faith had married Mr. Kirby, and had two sons, John and George, and four daughters, Ann, Fanny, Faith, and Elizabeth. By his will dated the 15th of April, 1799, the testator devised certain estates

* 340 * to the use of his daughter Elizabeth for her life, with remainder to her children ; and then, for default of her issue, to John, the eldest son of his daughter Mrs. Kirby, for his life, remainder to the children of John ; in default of his issue, to George, the second son of his daughter Mrs. Kirby, for his life, with remainder to the children of George, with remainder to his four granddaughters by name, Anne, Fanny, Faith, and Elizabeth Kirby, the only other children of his daughter Mrs. Kirby, for their respective lives in equal shares, with remainder to trustees to preserve contingent remainders ; and he then proceeded thus : “ With remainder in equal shares to the use of the children of my said four granddaughters and the heirs of their bodies, such children of my said granddaughters taking their mother’s share as tenants in common in tail, remainder to the survivors of such children ; and in default of issue of my said granddaughters, I give and devise all the same estates herein devised to such persons as would be entitled to the same in case I had died intestate and without issue.” The testator devised the residue of his real estates to his daughter Faith for her life, and after her decease to John the eldest son of Faith for life, with remainder to the children of John, with remainder to George, the second son of Faith, for life, with remainder to the children of George. And he continued thus : “ And for default of such issue, I give the same premises to the said Anne, Fanny, Faith, and Elizabeth, for their respective lives in equal shares, remainder to Robert Kitching and William Mitchelson and their heirs, in trust to preserve the contingent remainders hereinafter limited ; remainder in four equal shares to the use of the children of my said four granddaughters and the heirs of their bodies, such children of my said granddaughters taking their mother’s share as tenants in common in tail ; remainder to

* 341 the survivors or survivor of such children and the * issue of their, his, or her body in tail ; and in default of issue of

my said granddaughters, I give all the same estates last devised to Elizabeth Ness, my other daughter, for her life, with remainder over to her children."

The testator died in 1799. His daughter Elizabeth died long ago, without issue. His daughter Faith also died long ago. And her sons John Kirby and George Kirby died without issue.

The testator's granddaughter Anne Kirby, named in his will, married William Atkinson, and she had two children, the plaintiff William Atkinson and the defendant Ann Barton, the wife of the defendant William Barton. She died in the month of March, 1820; and Fanny, Faith, and Elizabeth Kirby, the three other daughters of Faith and granddaughters of the testator, all subsequently died without having been married.

In this state of circumstances, this suit was instituted for a partition, and for the purpose of having the rights of the plaintiff William Atkinson and of the defendant Ann Barton in the estates comprised in the particular and residuary devises ascertained and determined.

It was not disputed on either side that the particular and residuary devises ought to receive the same construction, and it was admitted that the defendant Ann Barton was entitled as tenant in tail to one-eighth of both estates, being the moiety of the fourth given to her mother Ann for life, with remainder to her children in tail; but it was contended on the part of the plaintiff William Atkinson, that, subject to the limitations in favour of the four several granddaughters for their lives and of their children in tail, the four granddaughters of the testator * took by im- * 342 plication estates tail in both the estates, with cross-remainders between them in tail, and that consequently, the plaintiff, as heir in tail of his mother Ann, was entitled to the three-fourths or six-eighths of the estates limited to Fanny, Faith, and Elizabeth for their lives, with remainder to their children in tail, they having died without issue, and that, therefore, upon the whole he was entitled to seven-eighths of the estates. On the other hand it was contended, on the part of the defendant Mrs. Barton and her husband, that she was entitled in tail to a moiety of the estates, either directly under the express limitations of the will, or upon the ground that the children of the granddaughters, and not the granddaughters themselves, took by implication estates tail, with

cross-remainders between them in tail ; and, consequently, that the defendant Ann Barton was entitled to a moiety of the estates.

The Master of the Rolls decided (a) that the plaintiff's contention was well founded, and ordered accordingly. The defendants appealed from so much of the decree as was consequent upon that decision.

Mr. Lloyd and Mr. Hobhouse, for the appellant. — The Master of the Rolls held, that the limitation over in default of issue of the granddaughters gave cross remainders in tail to the granddaughters, and that the appellant is only entitled to one-eighth, being one moiety of her mother's original share. We contend that in one of two ways the appellant has become entitled to four-eighths. In the first place we contend that in the gift to "the survivors or survivor of such children," "such children" extends to all the children of granddaughters, so that the limitation produces survivorship among the whole class of great-grandchildren.

* 343 Where the testator *intended a division *per stirpes*, he has said so, as in the immediately preceding clause. If this be the correct view, the plaintiff and defendant, as the only great-grandchildren, take the whole estate in equal shares. But if the Court is of opinion that the above clause of survivorship only provides for survivorship between the children of each grandchild *inter se*, so that as regards three-fourths of the estate it has become inoperative, we say that those three-fourths have become divisible between the plaintiff and defendant equally, by reason of the implication arising from the gift over in default of issue of the granddaughters. "Issue" here must be construed referentially, for the testator had already made limitations including all possible issue of the granddaughters ; it would therefore be incongruous to imply estates tail in the granddaughters, and the making them tenants for life is against such implication, especially as giving them estates tail would enable them to prevent the limitations over of their respective fourths to the children of other granddaughters from taking effect. The proper implication is that of cross-remainders in tail to the children. *Clache's Case*, (b) *Jarm. on Wills*, (c) *Vanderplank v. King*, (d) *Morse v. Lord Ormonde*, (e)

(a) 31 Beav. 272.

(d) 3 Hare, 1.

(b) *Dyer*, 330 b.

(e) 1 Russ. 332.

(c) Vol. 2, p. 459.

Ellicombe v. Gompertz, (a) Ashley v. Ashley, (b) Roe v. Clayton. (c)

The Solicitor-General (Sir R. PALMER) and *Mr. Nalder*, for the plaintiff. — The testator makes a quadrupartite division of the estate, which he carries on to the end of the express limitations to the children and issue of granddaughters. The limitation to the survivors applies only to survivors * of the same * 344 *stirps*. The construction which the defendant puts on this limitation is unnatural and leads to absurdity. Nothing can be less likely than a disposition which would make an estate divisible partly *per stirpes* and partly *per capita*, and would give shares to children in possession during the lives of their parents. The authorities support the view that the survivorship is only between the takers of each fourth *inter se*. *Clache's Case, (d) Rabbeth v. Squire. (e)* Then as regards the effect of the gift over, we submit that the Master of the Rolls was right in holding that the cross-remainders to be implied were cross-remainders in tail between the granddaughters. The gift over is in default of issue of the granddaughters themselves, not in default of issue of their children, so the implied estates tail must be in the granddaughters, and the fact that express estates for life are limited to them does not vary the case. *Jarm. on Wills, (g) Phipard v. Mansfield, (h) Livesey v. Harding. (i)* The case is not one in which the referential construction can be adopted. *Pride v. Fooks. (k)*

Mr. Hobhouse, in reply.

Judgment reserved.

December 13.

THE LORD JUSTICE KNIGHT BRUCE. — In the events which have happened, namely, that Elizabeth, one of the two daughters of Richard Ness, the testator in this case, died without having had any issue; that his other daughter, Faith Kirby, and all her

(a) 3 Myl. & Cr. 127, 151.

(b) 6 Sim. 358.

(c) 6 East, 628.

(d) Dyer, 330 b.

(e) 4 De G. & J. 406, 413.

(g) Vol. 2, p. 459 (2d ed.).

(h) Cowp. 797.

(i) 1 R. & Myl. 636.

(k) 3 De G. & J. 252, 280.

children, are dead; that only one of those children,
 * 345 *namely, Ann Ness Atkinson, had issue, and that Ann
 Ness Atkinson had two and only two children, namely the
 plaintiff and the defendant now before us, — I think that, according
 to the true construction of Richard Ness's will, the plaintiff and
 the defendant became, on the death of Elizabeth Kirby, whom I
 understand to have been the survivor of Mrs. Faith Kirby's chil-
 dren, entitled to the freehold and inheritance of the real estates
 devised by that instrument as tenants in tail in possession in equal
 shares, subject, of course, as to the plaintiff, to the instruments
 which have been executed by him, and, as to the defendant, to the
 instruments executed by her. My opinion accordingly is, that the
 defendant, as between herself and the plaintiff, is the owner of an
 undivided moiety, and not merely an eighth, of the estates in ques-
 tion.

The dispositions of one portion of them cannot properly be con-
 sidered without considering also those of the other, and I acknowl-
 edge that the five concluding lines of the first devise, and the words
 "remainder to the survivors or survivor of such children, and the
 issue of their, his, or her body in tail, and in default of issue of
 my said granddaughters," contained in the second devise, are in
 my judgment, when read in connection with the rest of the will,
 decisive.

The Lord Justice TURNER, after stating the circumstances of the
 case, and the nature of the contention between the parties, pro-
 ceeded as follows:—

The first question to be considered seems to me to be, whether
 the defendant Ann Barton is entitled to a moiety of the estates
 under the express limitations of the will. That question depends,
 as I think, upon the meaning to be attached to the word "such"

in the clause "remainder to the survivors or survivor of
 * 346 such children * and the issue of their, his, or her body in
 tail,"—whether the word "such" in that clause refers to
 the children of all the granddaughters taken collectively, or to the
 children of each of them taken severally. I have felt considerable
 doubt upon this point, more especially with reference to the expres-
 sion "such children" in the immediately preceding clause, where
 it must refer to all the children of all the granddaughters; but
 upon the whole I think that the latter of these two clauses is so

closely connected with the former of them, and arises so naturally out of it, in order to provide for survivorship, which the former clause had not provided for, that it would not be a sound construction to hold the word "such" contained in the latter clause to extend to other children than those immediately referred to in the former, that is to say, children taking their mother's shares; and I am of opinion, therefore, that, so far as this point is concerned, the appellant's case cannot be maintained.

The rights of the parties, therefore, in my view of this case, depend upon the question as to the cross remainders by implication. It is plain, as it seems to me, that cross remainders must be implied, the estates being to go over only in default of issue of all the granddaughters, and being to go over entire upon that event. The sole question, therefore, is, what cross remainders are to be implied. This is a question which must, as it seems to me, be determined upon the provisions of this particular will, taken in connection with the general principle upon which the implication of cross remainders is founded. I take that general principle to be, that the Court, upon examining the will, finds that there has been some omission, and it therefore introduces by implication such estates as are necessary to supply the omission, having regard in so doing to the manifest intention of the testator appearing by his will. Now in this case the estates * are * 347 only to go over on failure of the issue of all the granddaughters, and upon that event are to go over entire. It is to be implied, therefore, that whatever issue of granddaughters there may be, that issue is to take the estates; but the will has not provided for this, for it has not provided for carrying over to the issue of any of the granddaughters who may have issue the shares of any of the granddaughters who may have no issue. Estates, therefore, are to be implied by which these latter shares may be carried over. These estates, thus to be implied, may be either estates tail in the granddaughters, with cross remainders between them, or estates tail in the children of the granddaughters with cross remainders between such children, for either of such estates would effect the purpose to be accomplished; but then if estates tail in the granddaughters are implied, it would be in their power to prevent the shares of the estates limited to them and their children from going over to the children of the other granddaughters, and it would be in their power also to prevent the

estates going over in entirety according to the ulterior limitations, and thus in both respects to defeat the plain intentions of the will. Looking at the case, therefore, upon principle, and upon the provisions of this particular will, the Court ought not, I think, to imply cross remainders between the granddaughters, but ought to imply them between the children of the granddaughters, — an implication which, so far from defeating, would further, the purposes of the will.

The Master of the Rolls, however, seems to have considered that the authorities precluded him from making this latter implication, and he has referred particularly to *Clache's Case* (a) * 348 and to *Rabbeth v. Squire* (b) as so precluding him, those cases being considered by his Honor to have established, that the general rule, that cross remainders are to be implied where there is a devise to two or more in tail with a devise over in case they die without issue, does not apply where there is an express direction to insert cross remainders between the same objects in different events under different circumstances. His Honor has also referred to *Vanderplank v. King* (c) for the purpose of distinguishing it. Of course, if any such limitation of the general rule is established by authority, I should be most unwilling to disturb it, but the cases do not appear to me to establish it; *Clache's Case*, which has been treated as the leading authority on the point, does not, as I read it, lay down that this suggested limitation of the general rule applies to all cases or even generally. It is to be observed that in that case there was an express limitation over (which is not, I perceive, noticed in the statement of the case contained in Mr. Jarman's work on Wills, or in Powell on Devises on which that work was founded) in case the daughter, upon whose death the question arose, should die having no children, and it was, I think, upon that express limitation over, and not upon a cross remainder having been before created in a different event and under different circumstances, the decision proceeded. That case, indeed, decided that a cross remainder could not be implied against an express limitation; but as to the point in question, it cannot, I think, be considered to go further than that the creation of the cross remainder in the different event and under the different circumstances, might so indicate the intention

(a) Dyer, 330 b.

(c) 3 Hare, 1.

(b) 4 De G. & J. 406.

of the testator, as to prevent a cross remainder being implied, according to the general rule, from the gift over in case all the devisees * should die without issue; but this, of course, * 349 would be a question of intention, to be judged of upon the whole will and not upon any single disposition contained in it. That the point now in question was considered as open to doubt, notwithstanding the decision in *Clache's Case*, is evident from a passage in Powell on Devises, p. 608, in which doubts are expressed whether *Clache's Case* would be followed (a passage which is omitted in Mr. Jarman's book on Wills, in consequence probably of the decision in *Rabbeth v. Squire*). So far, indeed, from *Clache's Case*, being considered to rule the point in question, there is a very strong intimation in *Vanderplank v. King* of Sir JAMES WIGRAM's opinion against the general rule being limited according to the view suggested in *Clache's Case*; and with respect to the case of *Rabbeth v. Squire*, assuming it as I do to have been properly decided upon the construction of the particular will which was there under consideration, I do not think it can be considered as establishing any general rule applicable to all cases.

The result of the cases appears to me to be this: cross remainders are to be implied or not to be implied according to the intention. The circumstance of such remainders having been created between the same parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it. In this case the cross remainders created are between the children of the several daughters in the several fourths, and I do not think that the express creation of such remainders in the several fourths is sufficient to outweigh the implication to be derived from the other dispositions of the will, that cross remainders were intended as to the entire fourths. Such remainders would only come in upon failure of the issue of each daughter, and would not, therefore, interfere with the * express dispositions * 350 in favour of the children of each, but it was observed that the effect of implying the cross remainders in the entire fourths would be to let in the children of the granddaughters in the lifetimes of their mothers, and this would be so, unless cross remainders were to be implied between the granddaughters also, — an implication which, to say the least, would be open to much difficulty, but having regard to the plain intent that the children of

the granddaughters should take the inheritance, I think but little, if any, weight is due to this objection.

Upon the whole, therefore, with all deference to the opinion of the Master of the Rolls, my opinion is, that, upon the construction of this will cross remainders must be implied between the children of the granddaughters; and the appellant Mrs. Barton is, therefore, entitled to a moiety of the estate. (a)

In the Matter of ISABELLA DENBY, a Lunatic;

AND

In the Matter of AN ACT FOR BETTER SECURING TRUST FUNDS, AND FOR THE RELIEF OF TRUSTEES,

1861. December 13. Before the LORDS JUSTICES.

A legacy "to my friend J. S., of M., banker's clerk, and one of the executors of this my will," *held* not conditional on the acceptance of the office of executor.

ISABELLA DENBY, by will dated the 3d of November, 1847, gave to her friend Mr. John Pearson of Marsden Square, Manchester, the sum of 50*l.*, and to his daughter Mary Anne Pearson, a * 351 sum of * 50*l.*, with a bequest over to Henry Pearson if M.

A. Pearson should die in the lifetime of the testatrix. The testatrix then gave a legacy to Joseph Smith in these terms:—

"I also give and bequeath to my friend Mr. Joseph Smith, also of Manchester, banker's clerk, and one of the executors of this my will, the sum of 50*l.*; and I direct that these three legacies be paid out of any property I may die possessed of."

The testatrix then, after making various dispositions, appointed the above-named John Pearson and Joseph Smith the executors of

(a) This decision was reversed in the House of Lords (10 H. L. Cas. 313), but as the reasons given for the reversal do not bear upon the question, whether an express limitation of cross remainders necessarily excludes any implication of further cross remainders between the same objects, it is considered desirable to report the case.

her will. Joseph Smith upon the death of the testatrix renounced probate; and one of the questions which arose was, whether he thereby forfeited his legacy.

Mr. George Lake Russell, for the legal personal representative, contended that the legacy was conditional on the acceptance of the executorship. *Stackpoole v. Howell*, (a) *Reed v. Devaynes*. (b)

Mr. Snape, for Joseph Smith, referred to *Cockerell v. Barber*, (c) *Dix v. Reed*, (d) and *Burgess v. Burgess*. (e)

Their Lordships held that the legacy was payable.

* HUGHES v. THE CHESTER AND HOLYHEAD RAIL- * 352
WAY COMPANY.

1861. November 22, 25. December 10, 20. Before the LORDS JUSTICES.

By a clause in a railway Act, after reciting to the effect that the proposed line skirted the sea and would obstruct the traffic between the sea and the lands on its shore, and so deprive the lands of their natural advantages of position as respected the sea, and that the lands abounded with minerals, which in some cases belonged to persons not owners of the surface, and were well situated for manufactories and other purposes of commerce, and that it was desirable to give facilities of access between the lands and the sea, and from the sea and the lands on the seaward side of the line to parts inland: it was enacted to the effect that the owners or occupiers of any lands, manufactories, or mines, lying near or adjoining the railway, and in parts adjacent, might at any time make any railways across the railway (not crossing it on a level) and use them "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require." A neighbouring land-owner proposed to construct a railway on his own land and to carry it under the company's railway, and to use it as a public railway for general traffic. *Held*, that he was entitled so to do, and that the clause in the Act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighbouring lands.

(a) 13 Ves. 417.
(b) 3 Bro. C. C. 95.
(c) 2 Russ. 585.

(d) 1 Sim. & Stu. 237.
(e) 1 Coll. 367.

THIS was an appeal by the plaintiff from so much of a decree of Vice-Chancellor KINDERSLEY as declared that he was not entitled to use a railway to be made by him, for the purpose of conveying or carrying goods as a public carrier, charging fares or tolls, and also from so much of the decree as gave him no costs of suit.

The Chester and Holyhead Railway Company was incorporated by an Act 7 & 8 Vict. c. 65, and the 334th section, on the construction of which the dispute in the present case turned, was as follows:—

“ And whereas the line of the said intended railway skirts the margin of the estuary of the Dee and St. George’s Channel, in the counties of Flint, Denbigh, and Caernarvon, between the cities of Chester and Bangor, which will have the effect of obstructing the free intercourse and traffic between the lands on the

* 353 banks of the * said estuary and channel and the sea, and so depriving such lands of their natural advantages of position as respects the said estuary and channel; and whereas the said lands abound with coal and other minerals, and stones suitable for quarries, which latter, in some instances belong to and are the property of persons not the owners of the surface of such lands and hereditaments, and are also well situated for the erection of works and manufactories, and for other purposes of commerce, and it is desirable to give facilities of access between the said lands and the sea, and from the sea and the lands on the lower or sea-side of the said line of railway to parts inland: be it therefore, enacted, that nothing herein contained shall extend to prevent the owner or owners, lessee or lessees, occupier or occupiers, for the time being, of any lands, tenements, hereditaments, buildings, warehouses, manufactories, works, coal, and other mines, minerals or quarries, lying near to or adjoining the said railway, and in parts adjacent, at any future time or times, and from time to time hereafter as occasion shall be and require, from making any railways, tram or other roads, ways, approaches, or watercourses across the said railway hereby authorized to be made, so that any such railways, tramroads, and other roads, approaches, and watercourses in every instance be taken above or below such line of railway, and to use such railways, tramroads, or other roads, ways, approaches, and watercourses for the benefit of themselves and of all and every other person and persons to whom they or any of

them may from time to time give leave, and in such way and for such purposes as they or any of them may require, so that any such railway, tramroad, roadway, approach, or watercourse do no injury to, and do not prevent the free passage over, upon, and along, the said railway hereby authorized to be made by the said company, and so that all the works *connected with * 354 the passing thereof over or under the said railway, be done under the superintendence and to the satisfaction of the engineer for the time being of the said company, and according to plans to be approved by him; and the said company shall not be entitled to demand, have, or receive any tonnage or compensation whatsoever for the making of such way or the passing of any goods, persons, horses, carts, and carriages, mines, minerals, goods, merchandise, or other matters and things, along any such railway, tramroad, way, or approach, or compensation for any watercourse so to be made across the said line of railway hereby authorized to be made."

The plaintiff, who was a large land-owner, was entitled to a farm called Foryd Fawr Farm, in Denbighshire, adjoining the sea on the north, and to considerable property adjoining this farm on the landward side. The railway of the defendants was constructed for a considerable distance through this farm, from east to west, thus dividing the farm into two parts, and materially interfered with the communication between the sea and the plaintiff's land on the south of the railway, and between the plaintiff's lands on the opposite sides of the railway.

The plaintiff, in 1859, gave the defendants notice of his wish to construct a railway across and under the defendants' railway at Foryd, under the powers given him by the 334th section. This railway was to be entirely constructed on the plaintiff's own land, except where it crossed the defendants' line. A correspondence took place on the subject, and the defendants finding that the plaintiff intended to use the railway, not only for conveying his own minerals and goods, and for other purposes connected with the convenient enjoyment * of his own lands, but also for * 355 the purposes of general traffic as a conveying line, refused to allow it to be made. The plaintiff thereupon filed his bill to have it declared that he was entitled to make his railway, and for

an injunction to restrain the company from interfering with the making of it.

The cause was heard before Vice-Chancellor KINDERSLEY, assisted by Mr. Justice WILLES and Mr. Baron CHANNELL. Mr. Justice WILLES was of opinion that the plaintiff would be entitled to use his railway for all lawful purposes, but the Vice-Chancellor and Mr. Baron CHANNELL were of opinion that he would only have a limited right of user. The Vice-Chancellor accordingly made a decree (a) establishing the right of the plaintiff to make the railway, and granting a perpetual injunction to restrain the defendants from preventing his making it, but declaring that he was not entitled to use such railway so made or to be made by him for the purpose of conveying or carrying passengers or goods as a public carrier, charging fares and tolls.

Mr. Glasse, Mr. Giffard, Mr. Mellish, and Mr. Bristowe, for the appellant. — The question is, for what purposes the plaintiff is entitled to use his railway, which it is admitted that he was entitled to make. This turns on the construction of the company's Act, 7 & 8 Vict. c. 65, § 334. The plaintiff's railway is wholly on his own land, except where it crosses the defendants' railway. Before the Act he might have made a railway in any direction over his own ground, and have charged for the use of it. Is this right taken away by the Act? He might have made a railway
 * 356 for any purposes he pleased over his own land, * even alongside the company's line. The Act contains no restrictions as to his right of taking tolls, though a restriction is imposed on the company's doing so. The company's Act, which interferes with private rights, is not unnecessarily to be construed so as to make it take away any rights of the land-owner further than was necessary for the purposes of the Act. Where a prohibition or restriction upon the land-owner was intended, it is expressed. The object of the 334th clause was not to create a new right, but to reserve to the land-owner his previous rights, and the *onus* is on the company to show that he cannot use a railway on his own land for any purpose he pleases. His using the railway for public traffic is no burden on the company, and they could not prove

(a) 1 Drew. & Sm. 524.

damage if they brought an action, for their Act does not give them any monopoly. In the absence of negative words, how can the rights of the land-owner be confined in the way the company contends? There is no rule of public policy against the plaintiff. 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55.

The Solicitor-General (Sir R. PALMER), *Mr. Speed*, and *Mr. Millar*, for the company. — It is contended for the plaintiff that the intention of the legislature was to give the company certain powers for the purposes of their undertaking, leaving the rights of the land-owners in all other respects unaffected. But the reservation, apart from which the plaintiff could not make his railway, is introduced by a preamble, showing that it was inserted for a special reason, and was intended only to apply for the purpose of preserving to the land-owners the specific advantages there mentioned. It is contended that the burden lies on us to show why the plaintiff should not do what he pleases on his own land; but where his railway crosses ours, he is not on his own land; the conveyance to us gave us the freehold, and the * plaintiff has * 357 only an easement, the extent of which must be defined by the clause which reserves it. *Durham and Sunderland Railway Company v. Walker*. (a) On the 334th section there are three points: Who are the persons to whom the right is given? what is the subject in which it is given? and what is the extent of the right given? The right is given to the owners, lessees or occupiers of lands lying near to or adjoining the railway; it is given solely with reference to their position; it only extends to what is near the railway. It could not be intended to give the owner of every scrap of property near the line the right to make a public railway across that of the company. According to the construction for which the plaintiff contends the preamble is surplusage. We contend that it is explanatory. The word "require" is properly to be construed "have need of in respect of their lands." *Farrow v. Vansittart*. (b) The Act must be construed according to the same principles as a deed, the clause in question relating to private rights. *Durham and Sunderland Railway Company v. Walker*, (a) *Dand v. Kingscote*. (c) Here the object of the clause

(a) 2 Q. B. 940, 967.

(c) 6 M. & W. 174, 197.

(b) 1 Railw. Cas. 609.

was to furnish means of access to particular lands ; the words " as occasion shall be and require " clearly show this, if the preamble be looked to. The lands adjoining the railway were the dominant tenements, the railway was made the servient tenement, and an easement was granted, which, were it granted by deed, must be limited by the purposes of the dominant tenements. Thus a watercourse could not be made for draining distant lands. *Lawton v. Ward*, (a) *Durham and Sunderland Railway Company v. Walker*, (b) *Allan v. Gomme*. (c) The Acts 3 & 4 Vict. c. 97, and 5 & 6 Vict. c. 55, place railways on such a footing, that * 358 it cannot have been the * intention of the legislature to allow a railway for the general conveyance of passengers to be made under the clause now in question. The 308th, 346th, 358th, and 327th, sections of the Act are in our favour.

Mr. Glasse, in reply. — The Act is to be construed favourably for us. Our rights were intended to be interfered with so far only as was necessary for the construction and convenient working of the defendants' railway. " Require " is therefore to be construed " ask or demand." The intention of the clause, to be collected from its language, is to preserve to the lands about the railway all advantages arising from their position. The cases of dominant and servient tenement do not apply, for there the surface rights are interfered with, here they are not ; for we are only making a railway on a lower level, which does not interfere in substance with the rights of the railway company, who, in fact, are only owners of the surface, the mines being in the plaintiff. *Farrow v. Vansittart*, and *Durham and Sunderland Railway Company v. Walker*, do not apply, for they were cases between landlord and tenant.

Judgment reserved.

December 20.

THE LORD JUSTICE KNIGHT BRUCE. — Upon this appeal, an appeal by the plaintiffs from the decree in the cause pronounced by the Vice-Chancellor KINDERSLEY on the 11th of June last, the only questions argued have been, first, whether the declaration now contained in

(a) 1 Ld. Raym. 75.

(c) 11 Ad. & El. 759, 772.

(b) 2 Q. B. 940, 967.

it, that the plaintiff is not entitled to use his railway (the subject of the litigation) for the purpose of conveying or carrying passengers or goods as a public carrier, charging fares or tolls, ought to be omitted, and, secondly, what ought to be done as to the costs of the * suit, his Honor having given none on either * 359 side. On the hearing the Vice-Chancellor had the assistance of Mr. Justice WILLES and Mr. Baron CHANNELL. The case as so heard, and the able opinions upon it delivered by those three learned Judges, of whom Mr. Justice WILLES differed from the others, have been fully reported by Mr. Drewry and Mr. Smale, whose report was in the hands of the learned counsel in the cause when it was argued, well and elaborately argued, before us, in and after Michaelmas term last. Mr. Justice WILLES considered that the disputed declaration ought not to be in the decree; Mr. Baron CHANNELL and the Vice-Chancellor that it ought to be there, — the point depending, I apprehend, altogether on the true construction of the 334th section of an Act of Parliament, intituled “An Act for making a Railway from Chester to Holyhead,” which received the royal assent on the 4th of July, 1844. The dispute before us is one strictly civil, concerning mere rights of private property between the plaintiff and defendants, and the declaration, if, as one upon a matter strictly civil concerning mere rights of private property claimed by the plaintiff against the defendants or by them against him, it is not rendered necessary or not supported by that section, must, I think, be dropped. Does, then, or will such a mode of using or employing the plaintiff’s railway as the declaration prohibits, do an “injury” (in the language of the 334th section), — do an injury to the railway of the Chester and Holyhead Railway Company, within the meaning of the 334th section, or prevent the free passage over, upon, and along it? That question must, I think, be answered in the negative. But is such a mode of using or employing the plaintiff’s railway nevertheless forbidden by the section, containing as it does the recitals with which it commences, and containing also as it does the word “require,” more than * once to be found in it, and the word “occasion”? * 360 This question likewise must, as I conceive, be answered negatively; and, agreeing with the conclusion of Mr. Justice WILLES, I consider that the declaration already mentioned to which the plaintiff objects should be taken out of the decree. With regard to the costs of the suit, my learned brother being on that

point of opinion with the decree, and being also of opinion that there should be no costs of the appeal on either side, I need not nor shall say any thing. We agree that the deposit should be returned.

THE LORD JUSTICE TURNER. — This is a question upon the construction of the 334th section of the company's Act. The Vice-Chancellor Sir RICHARD KINDERSLEY has, with the concurrence of Mr. Baron CHANNELL, but in opposition to the opinion of Mr. Justice WILLES, held, upon the construction of that section, that the plaintiff is not entitled to use the railway made by him for the purpose of carrying or conveying passengers or goods as a public carrier, charging fares or tolls, and has declared accordingly by his decree. The appeal before us is by the plaintiff from this part of the decree, and also from so much of it as gives no costs of the suit.

The principal question of course is the question of construction. In the course of the argument before us, reference was made to several other sections of the Act besides the 334th; but all the Judges who have had this case under their consideration have thought, and I agree in that opinion, that those other sections do not materially bear upon the point we have to decide, and they may therefore be laid out of the case. The case too has been so
 * 361 recently argued, that it is unnecessary * to recapitulate the facts, more especially as the section we have had to consider seems of itself to be sufficient to show the nature of the question we have to decide.

In construing this section, it may be well, in the first place, to consider the rule which ought to be applied to the construction of the Act. This is an Act which interferes with private rights and private interests, and it ought, therefore, according to all the decisions upon the subject, to receive a strict construction, so far as those rights and interests are concerned. This is so clearly the doctrine of the Court, that it is unnecessary to refer to cases upon the point. They might be cited almost without end. Supposing, however, the general rule as to the construction of Acts of this description to be less settled than I take it to be, this particular Act seems to me to afford strong grounds for applying the rule of strict construction against the company. The section which we have to consider provides that no injury is to be done to the railway, and

that the free passage over, upon, and along it is not to be prevented. To the extent in which the public interest is concerned, that interest is thus secured ; and we cannot, I think, impute to the legislature, in an Act of this nature, an intention, which is not expressed in the Act, to prefer the private interests of the shareholders in the railway in respect of the profits to be derived from it, over the private interests of the land-owners in respect of the profits to be derived from their lands. So far, therefore, as the question depends upon the general construction of the Act, I think the construction ought to be in favour of, and not against, the plaintiff.

Passing from the general construction of the Act to the particular section under consideration, the case has been argued upon the principles applicable to cases of * exception, of * 862 reservation, and of easement ; but to decide the case upon any such grounds would be to lay out of consideration the scope and purpose of the Act. The case ought, in my opinion, to be decided upon the intention of the legislature, to be collected from the general purpose of the Act, and from the provisions of the particular section on which the question depends, and not upon the general rules which may apply to cases of another and a different description. What I have already said is, I think, sufficient to indicate my opinion as to the intention to be collected from the general purpose of the Act. It remains, therefore, only to consider the provisions of the particular section. In considering those provisions, it must, I think, be admitted that the recitals ought to be taken into consideration,¹ for whether they do or do not indicate the full purpose for which the enactment was made, they undoubtedly indicate one of the purposes — and it may not be going too far to say, the principal purpose — on which it was founded. I will therefore first consider the recitals. They are two. First, that the railway will obstruct the intercourse between the lands on the banks of the estuary and channel and the sea, and thus deprive those lands of their natural advantages of position as respects the estuary and channel ; and, secondly, that it is desirable to give facility of access between those lands and the sea, and from the sea and the lands on the lower or sea-side of the line to parts inland. With respect to both these recitals, it is to be observed, that they do not apply to any particular lands, but that they extend to all

¹ See Kerr Inj. 801.

lands on the banks of the estuary and channel between Chester and Bangor, where the line of the railway skirts the margin of the estuary; and that it is evident, therefore, that they have no reference to any particular inland communication.

* 363 * Then as to the first recital, it is in these terms — [His Lordship read the recital.] This recital, therefore, points to intercourse — and, as it is expressed in the Act, free intercourse — between all the lands on the bank and the sea; and pointing, as it does, to free intercourse, it certainly indicates no intention to limit the nature of that intercourse. It was said, however, on the part of the company, that the intercourse thus pointed at is only between the lands on the bank and the sea, and that the intention is thus indicated that the right of access to the sea should not be afforded to lands lying beyond and further inland than those upon the bank. I think, however, that this argument cannot be maintained to the extent to which it was attempted to push it, for although it cannot, of course, have been the intention of the Act to give to the inland proprietors or persons interested in their lands a right to pass over the lands of the owners on the bank without their consent, it was before the passing of the Act competent to these latter owners to grant such a right on any terms which they might think fit. They might agree to grant the right at so much per head for every passenger, or so much per ton for every ton of goods, and the power to grant such rights is most valuable, more especially in mining districts, such as this district appears to be. This, as it seems to me, was one of the natural advantages of the position of the lands on the bank, and the recital is express that those lands were not to be deprived of their natural advantages of position. With all possible respect, therefore, to the opinions which have been expressed upon the point, it seems to me that this first recital, to say the least of it, does not at all assist the case of the company.

Then as to the second recital. It is in these terms — [His Lordship read it.] It is here to be observed, that the lands
* 364 described as abounding with coals and minerals, * and as well situated for purposes of commerce, are clearly lands both on the higher or land side of the railway and on the lower or sea side of it, and that the mines under these lands are described as, in some instances, not belonging to the owners of the surface; and that what is said to be desirable is, to give facilities of access

between the said lands and the sea, and from the sea and the lands on the lower or sea side of the line of railway to parts inland. Here, again, the purpose expressed of giving facilities of access between the lands on the bank and the sea, was relied upon on the part of the company as indicating the same intention as was said on their part to be indicated by the first recital; but it does not seem to me that the express recital, that it was desirable that facility of access should be given as to these particular lands, at all indicates that it was not desirable that the same facility should be given as to other lands lying further inland, more especially when it is remembered that, if I am right in the observations which I have made upon the first recital, the access, when given to the particular lands, might be extended to those other lands, — a circumstance which may, perhaps, explain the use, in the one part of this recital, of the words “between the said lands and the sea,” and in the other part of it of the words “the lands on the lower or sea side of the railway to parts inland.” This latter expression at the end of the recital seems to me to afford an important observation in favour of the plaintiff, for it is hardly possible to conceive why it would be more desirable to give facilities of access between lands on the lower or sea side of the railway to parts inland, than to give facilities of access between lands on the higher or land side of the railway and the sea. A mine owner on the higher or land side of the railway would as much require access for his mineral produce to the sea as a mine owner on the lower or sea side of the railway * would require for his produce access * 365 to parts inland, and I see no limit which can be put upon the words “parts inland.” It is observable, too, with reference to this second recital, that it refers to cases in which the owner of the surface would have a right to compensation for the passage over his land. A mine owner, for instance, could have no right to pass over the lands of the surface owner without his consent, or without making compensation; and it is plain, therefore, that the Act contemplated cases in which compensation would be to be made to the surface owner for the right of passing over his lands. Speaking, therefore, again, with all deference to the opinions which have been expressed, it seems to me that this second recital adds but little, if any thing, to the case of the company.

We come then to the enacting part of the clause. The first part of the enactment runs thus: [His Lordship read the first part

of the enactment ending with the words "above or below such line of railway." This, therefore, is not an enactment applying between the several owners of the several lands and mines. It is an enactment between the several owners of the lands and mines and the company, that the Act shall not extend to prevent the making of the particular works which are referred to,—leaving the rights of the owners *inter se* as they stood before the passing of the Act. It is to be observed, too, that this enactment goes beyond the recital, for, independently of any observation which might be made upon the introduction of the words "lessees or lessee," "occupiers or occupier," the enactment extends to the owners, lessees, and occupiers of lands and mines in parts adjacent, and not merely to the owners, lessees, and occupiers of lands on the banks. Now it is not disputed that unless the enactment is cut * 366 ment is cut * down by the recitals it must have its full effect, and for the reasons already given I do not think that the recitals can be construed to cut it down, even assuming (on which I give no opinion) that the language of the enactment is not sufficiently clear to preclude its being limited by the recitals. We have thus far, therefore, in my opinion, a clear right given to the owners, lessees, and occupiers of the lands and mines near to or adjoining the railway, and in parts adjacent, to make railways, &c. The main argument, however, on the part of the company, with reference to this enactment, was rested upon the words "as occasion shall be and require," which it was said must be taken to refer to such occasions as are mentioned in the recitals, and to limit the right of making the railways, &c., to cases in which such occasions should render them necessary; but these words are perfectly general; there is no context in the enactment to limit them, and, as I apprehend, they operate to constitute, and must be taken to constitute, the owners, lessees, and occupiers, and not the company, the judges of what works were required, and when there was occasion for them; for this, if I am right in the construction of the recitals, is most in conformity with the spirit and purpose of the Act, and not only so, but it is in conformity also with the general principles applicable to cases in which undefined benefits are conferred, in which cases the measure of the benefit rests, as I apprehend, with the persons on whom it is conferred. I think, therefore, the first enactment does not admit of any such limitation as is contended for on the part of the company.

Then as to the second, it is this : Nothing in this Act contained shall extend to prevent the owners, &c., from using (for this must be the construction of the words "to use") such railways, &c. [His Lordship read the remainder of the clause.] The observations which have * been already made upon the words * 367 "as occasion shall require" seem to me to apply with equal force to the words "in such way and for such purposes as they or any of them may require," and it is unnecessary, therefore, to say more upon those words ; but we have here the words "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave," words upon which the Vice-Chancellor seems to have placed very great reliance. If, however, I correctly apprehend the meaning of these words, they seem to me to be not inaptly framed for the purposes in view. There were, I think, here two purposes in view : one to give the right of user as against the company, the other not to give to one owner the right of user over the lands of another without his leave. If the clause had stopped at the word "watercourses" and the words "for the benefit," &c. had not been introduced, it might have been contended that personal user and personal user only was intended to be conferred, and the words "for the benefit of themselves and of all and every other person and persons" were therefore inserted to remove any doubt upon that point ; but then, if the clause had stopped at the words "person and persons," it might have been contended that the right of user was given to all and every person and persons without restriction, and the words "to whom they or any of them (which, of course must be understood to mean respectively) may from time to time give leave" were inserted to prevent this construction. This, I confess, with all deference to the opinion of the Vice-Chancellor, appears to me to be the fair and reasonable meaning of this sentence, and so construing it, I think it rather favours than prejudices the plaintiff's case. The remaining provisions of the section seem to me to be also in favour of the plaintiff. If the intention had been to prevent injury to the shareholders * of the com- * 368 pany independently of any injury to the railway itself, surely that intention would have been expressed in the next succeeding provision, which provides against injury being done to the railway ; and although there is much force in the observations of the Solicitor-General on the clause as to tonnage and compensation, I

hardly think that if it had been intended by the Act to limit the purposes for which the owners and others were to use their railways some indication of that intention would not have been found in this clause. The case on the part of the company was attempted to be strengthened by arguments founded on the general Acts relating to railways, but the provisions of those Acts do not appear to me to affect the question arising between the plaintiff and the company upon this Act. I think, therefore, that the declaration complained of must be struck out of the decree. Upon the second branch of the appeal we were asked at the bar to give the plaintiff the costs of the suit, but under the circumstances of the case I agree with the Vice-Chancellor that there should be no costs of the suit, and I think there should be no costs of the appeal.

1861. December 9, 10, 11, 21. Before the LORDS JUSTICES.

The vendor of a contingent reversionary interest in bank-stock and real estate, at a price calculated by the purchaser upon statements of the value of the real estate made by the offer to sell, having filed his bill to set aside the sale as being made at an undervalue, *held*, that although as a general rule the *onus* lies on the purchaser of a reversion to show that he gave a fair value, yet where the vendor has stated in his proposals the value of the *corpus* of the property, it lies upon the vendor to allege and prove that the value was understated.¹

Per the Lord Justice TURNER, *semble*, a sale of a reversion at a price calculated according to tables in common use cannot be set aside merely on the ground that another set of tables in common use would give a higher value.²

The purchasers bought taking bank-stock at 200*l.* per cent. The then market price was 215*l.*, and the average market price for the last eleven years 217*l.*

¹ See *Edwards v. Burt*, 2 De G., M. & G. 55, note (1), and cases cited; *Earl of Aldborough v. Trye*, 7 Cl. & Fin. (Am. ed.) 436, note (1); 1 Sugden V. & P. (8th Am. ed.) 277 *et seq.*; 2 Dart V. & P. (4th Eng. ed) 686; *Kerr F. & M.* (1st Am. ed.) 81, 187, and note (1). But it has been enacted by 31 Vict. c. 4, that no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall be hereafter opened or set aside merely on the ground of undervalue. *Kerr F. & M.* (1st Am. ed.) 187, note (1).

² See *Earl of Aldborough v. Trye*, 7 Cl. & Fin. (Am. ed.) 436, note (1); 2 Dart V. & P. (4th Eng. ed.) 690, 691.

These facts were held not to be conclusive evidence of purchase at an under-value, there being strong evidence to show that, in the opinion of actuaries, it was reasonable in the purchase of a reversion to treat bank-stock as only worth 200*l*.¹

Costs of selling real estate are to be regarded in valuing a reversionary interest in the sale moneys.

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls dismissing, with costs, his bill, which was filed to set aside a sale of a reversion.

In the year 1857, the plaintiff, under the will of a Mrs. Butt, was entitled, in the event of his surviving his mother, to one-sixth of Mrs. Butt's residuary estate, which was being administered by the Court in a suit then pending. In July, 1856, he had mortgaged this reversionary interest to the London Life and Guarantee Society, the mortgage containing a power of sale. In 1857, the interest being in arrear, the mortgagees expressed an intention of exercising the power of sale, and the plaintiff thereupon endeavoured to sell his reversion, and made inquiries of different societies with that view, but none were disposed to purchase. He ultimately, on the 11th of May in that year, made to the Norwich Union Reversionary Interest Company a proposal, which described the interest offered for sale in the following terms:—

"A contingent reversion of one-sixth or other share of the undermentioned bank-stock and freehold and leasehold *estates and moneys invested as follows: 4236*l*. bank-stock, *370 of the estimated value of 8744*l*.; a leasehold messuage, No. 11, Pulteney Street, Bath, let at 100*l*. per annum, 1000*l*.; a freehold estate at Evercreech, in the county of Somerset, 1800*l*.; a freehold estate at Bagbury, in the county of Somerset, purchased in 1845, 5000*l*.; a freehold estate at Evercreech Park, in the county of Somerset, 14,250*l*. 0*s*. 8*d*.; a freehold estate, comprising two fields, called Elbon Field and Quarry Ground, in the county of Somerset, purchased in 1848, 554*l*. 3*s*. 10*d*.; freehold ground rents at Brighton, purchased in 1848, 3900*l*.; total, 35,248*l*. 3*s*. 10*d*. The above property is divisible on the death of the vendor's mother, now aged fifty-four years, amongst her children, six of whom are living, and contingent upon the vendor, now aged thirty years, surviving

¹ See 2 Dart V. & P. (4th Eng. ed.) 690, 691.

her. The bank-stock is standing in the name of the accountant-general of the Court of Chancery to the credit of the cause *Perfect v. Stockwell*, and the estates are vested in the name of Mr. Thomas Stockwell, the surviving trustee. The suit is instituted for the purpose of taking the trustees' accounts, and for the appointment of new trustees. A succession duty of 1l. per cent will be payable on the division of the estate."

Upon this proposal being made to the company, the following question was submitted by them to Mr. Downes, their actuary: "What is the value of the contingent reversions to one-sixth of 4236l. bank-stock, and one-sixth of freehold and leasehold property, valued at 26,504l. (a very small portion is leasehold), on the death of fifty-four, provided thirty be then living?" Mr. Downes, in answer to the question submitted to him, certified that the value of the reversion was 1562l. 10s. The company then agreed to purchase the reversion for 1550l., having deducted 12l. 10s.

* 371 from the valuation for the * estimated costs of the purchase.

The 1550l. was afterwards, in consequence, as it appeared, of the rental of the house at Bath being less than was mentioned in the particulars, agreed to be reduced to 1500l., and ultimately that sum was paid by the company, and the purchase completed in 1858.

Mr. Downes, it appeared, in making his calculation, took the bank-stock as worth 200l. per cent, and took the value of the freehold and leasehold properties at the amounts mentioned in the proposal. The valuation proceeded solely on the *data* in the question put to Mr. Downes, and so no allowance was made for succession duty or costs. Evidence was adduced to show that the value of 200l. per cent attributed to the bank-stock in the proposal, was too low; and that the price on the average of the last eleven years was 217l., the actual price in July, 1857, 215l.

The tenant for life died on the 12th of August, 1859; and the plaintiff filed his bill to impeach the sale on the ground of inadequacy of price. Several actuaries gave evidence on his behalf, valuing the reversion at sums the average of which was about 2000l., the lowest being about 1600l.

Most of the plaintiff's witnesses took the bank-stock at 215l. per cent; but Mr. Morgan, the eminent actuary, took 200l. as being the proper value for this purpose. Several of them allowed

only for the expense of insuring the plaintiff's life against that of his mother for a sum much less than one-sixth of the total value of the property ; but it was shown, that in purchasing a contingent reversion it was usual for the purchaser to allow for the expense of insuring to an amount equal to the total value.

* The Master of the Rolls dismissed the bill with costs, * 372 being of opinion that it was sufficiently shown that the price the defendants gave was the full market value at the time.

The plaintiff appealed.

Mr. Lloyd, Mr. Baggallay, and Mr. Renshaw, for the appellant. — The *onus* lies on the defendants to show that they gave the fair value. *Edwards v. Burt.* (a) [The Lord Justice KNIGHT BRUCE referred to the observations on that case. *Sugd. Vend. & Purch.* (b)], *Shelley v. Nash*, (c) *Salter v. Bradshaw*, (d) *Davis v. Duke of Marlborough*, (e) *Talbot v. Staniforth*. (g) In the last case it was impossible to make a scientific calculation of the value, yet it was held that the *onus* still lay on the purchaser to prove that a fair market value was given ; and, indeed, the greater the uncertainty as to the value, the greater the *onus* thrown on the purchaser. In order to ascertain the value of the reversion, the defendants must prove the value of the *corpus*, which they have not done.

[The Lord Justice KNIGHT BRUCE asked, whether in any of the cases it had been decided whether the circumstance, that the expenses of a sale, necessary for the purpose of division, would diminish the fund, ought to be taken into consideration ? *Edwards v. Browne* (h) and *Lord Aldborough v. Trye* (i) were referred to.]

The circumstances were not such as make a sale analogous to a sale by auction ; there was no competition, proposals being only made privately * to a few societies, none of whom * 373 stated what they were willing to give. Then, upon the evidence, we say it is clear that the fair price was not given. A valuation which proceeded on the footing of bank-stock being

(a) 2 De G., M. & G. 55.

(b) Page 235 (13th ed.).

(c) 3 Madd. 232.

(d) 26 Beav. 161.

(e) 2 Sw. 122, 163.

(g) 1 J. & H. 484, 504.

(h) 2 Coll. 100.

(i) 7 CL & Fin. 436.

worth only 200*l.* per cent, condemns itself; and the evidence on our part shows clearly that the reversion was worth about 500*l.* more than it was valued at. That there were unascertained costs and expenses to be provided for, cannot account for more than a small fraction of this deficiency, since only one-sixth of them could fall upon his share.

Mr. Selwyn and *Mr. Walford*, for the defendants, in support of the order of dismissal. — We do not impugn the decision in *Edwards v. Burt*. It perhaps goes to the edge of the law, but it lays down no new rule; it only applies the established law to the circumstances of that case. There is now no reason for pushing that law to its extreme; the rule itself has become a useless anomaly, for the repeal of the usury laws makes it practically easy to alienate a reversion absolutely by mortgaging it at a high rate of interest. But taking the law as it stands, apart from that point, the rule is, that the purchaser must show that a fair market value has been given. The best test of market value, next to an auction, is to apply to persons who deal in such commodities, to ascertain what they will give. Lord ST. LEONARDS allows one-third as the difference between actuarial value and market value. Now the plaintiff's witnesses evidently go only upon the actuarial value; their cross-examination clearly shows that they took none of the unfavourable circumstances into consideration, especially the unascertained costs, which, as our evidence shows, would have made the reversion almost unsalable by auction. As to the bank-stock, eminent actuaries treat it as properly valued at 200*l.*

* 374 * per cent, owing to the uncertainty of what the price would be when the reversion fell into possession. As to the landed property, — even if it lies in the plaintiff's mouth to say that he gave too low a value of the *corpus* in his proposals, though it was manifestly his interest to overstate rather than understate the value, — at all events, the *onus* cannot lie upon the defendants of showing that the plaintiff did not understate it.

Mr. Lloyd, in reply. — Nothing more than inadequacy of value is required in order to set aside the purchase: *Boothby v. Boothby*, (a) and the *onus* of proving the adequacy of the price is on the defendants. The evidence of the defendants as to the price of bank-

(a) 1 Mac. & G. 604.

stock cannot be attended to. The price of the day having been 215*l.*, and the average price for the last ten years still higher, no opinions, however eminent, can lead the Court to the conclusion that it was properly valued at 200*l.* The evidence of the defendants, as to the value of the other property, goes upon the rental; but the rental was not in the proposals, and the rental is not a certain guide as to the value of a property, for it may happen to be let too low. *Peacock v. Evans.* (a) The statement by the vendor of the value of the *corpus* cannot shift the *onus* from the purchasers, any more than his offering the reversion to them at a certain price would shift the *onus*, if they purchased at that price.

Judgment reserved.

December 21.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that in estimating the value and fixing the price, on the occasion and for the purpose of the sale *impeached by the bill in *375 this cause, of the interest, a contingent reversionary interest, comprised in that sale, the powers of conversion contained in the will of Mrs. Butt, by which that interest was created, and the number and variety of the properties subject, in 1857 and 1858, to those powers, were matters reasonable and proper to be taken into consideration; and I am satisfied, upon all the evidence of the numerous witnesses before us, that, whether we regard the defendants' purchase as made in 1857 or 1858, they have clearly shown the sum of 1500*l.* to have been at that time not less than the just value of the interest so purchased, nor less than a fair, sufficient and full price for it, Mrs. Perfect, the tenant for life of the property subject to the trusts of the will, having lived some time after the completion of the purchase; namely, until a day in August, 1859. 1500*l.* was the agreed price paid in 1858; and accordingly I conceive that the order of the Master of the Rolls dismissing the bill was right, notwithstanding the early death of Mrs. Perfect; the fact that it happened so soon after the completion of the sale, or has happened at all, being not, in my judgment, rendered of any importance or weight by the materials before us, or any part of them.

(a) 16 Ves. 512, 516.

THE LORD JUSTICE TURNER. — This is a bill to set aside a purchase by the defendants from the plaintiff of a reversionary interest. The Master of the Rolls has dismissed the bill with costs, and the plaintiff has appealed. It is well settled, that purchasers of reversionary interests are bound to prove that they have given the fair value, which, in cases of estimable value, would in general be the market value of the interests which they have purchased;¹ and the only question in this case is, whether the evidence before us is sufficient to satisfy the Court that the fair value, which

* 376 * in this case may be taken to be the market value, of the interest purchased by the defendants, was in fact given by them. The transaction of this purchase originated in a proposal made by the plaintiff to the Norwich Union Reversionary Interest Company, of which the defendants are the trustees.

[His Lordship here stated the form of the proposals, the question submitted to Mr. Downes, his answer, and the completion of the purchase for 1500*l.* as mentioned above.]

Eliza Harriett Perfect, the tenant for life, died on the 12th August, 1859. Her early demise has of course rendered the purchase very beneficial to the company, and the sale of it very prejudicial to the plaintiff, and he now complains of it on the ground of undervalue.

Whether this complaint be just or not must, of course, be judged of according to the facts as they stood at the time of the purchase, and not according to the result. Much of the argument, on the part of the plaintiff, proceeded on the ground that the company was bound to inquire into the values of the several properties included in the purchase. It was said that the company being bound to prove the value of the reversion, they were bound to prove the value of the properties in possession on which the value of the reversion would depend; but in this case the plaintiff has, as to most of the properties, stated the values in the proposal, and whatever obligation may rest upon the purchaser of a reversion to prove the value of the property in cases where the value is not stated, or even, under special circumstances, in cases where the value is stated, I do not think that, in the absence of special cir-

¹ See 2 Dart V. & P. (4th Eng. ed.) 690, 691; *Earl of Aldborough v. Trye*, 7 Cl. & Fin. (Am. ed.) 436, note (1).

cumstances, and I see none such in the present case, it can be competent to the vendor of a reversion to complain that the purchaser has taken the value of the property to be such as he, the vendor, has * represented it to be. So, again, as to the * 377 rest of the properties included in this proposal, it was, of course, for the plaintiff's interest to represent them to be of the highest value which could fairly be set upon them; and although, as to these properties, the plaintiff has not stated in the proposal the present actual values, he has stated the prices at which the properties were purchased some few years before, and the company was, as I think, justified in assuming those prices to be the then actual values. Where a value, either actual or to be reasonably presumed, is set upon the *corpus* of the property in the proposal, I cannot think that any such obligation as has been contended for in this case can rest upon the purchaser of the reversion in the absence of special circumstances, and I think that, in such cases, it must rest upon the vendor to allege and prove that the value was understated in the proposal. In the present case I have not been able to find any such allegation or proof.

The case therefore seems to me to revolve itself into the dry question of the market value of the reversion of these properties, taking them to be of the value stated in the proposals. This, no doubt, is a question difficult to be solved, and thus far I agree with the argument on the part of the plaintiff, that it is not sufficient for the company to say that they gave substantial value, and that it was incumbent on them to show, as far as the nature of the case would admit, that they gave the fair value. In my opinion they have proved this. Mr Downes, the actuary of the company, was first consulted. He valued the reversion at 156*l.* 10*s.*; and, in making the calculations by which he arrived at this result, he took the bank-stock at 200*l.* per cent, and the other properties according to the statements made in the proposal. Now, as I have already stated, I think that the valuation cannot be impeached upon the ground of any supposed * higher value of * 378 any of those other properties, and therefore I will come to the question, whether the taking the bank-stock at so low a rate as 200*l.* per cent is sufficient to establish that the sale was made at an undervalue. Now this reversion had been offered for sale to various other offices, and among others to the English and Scottish Law Life Reversionary Interest Company, and Mr. Williams, the

actuary of that company, states in his evidence, that in valuing it he took the bank-stock at 200*l.* per cent. If, therefore, the case had rested here, I should not have considered that there was enough in the mode in which the value of the bank-stock was taken to impeach the purchase of the reversion. But, in truth, the case does not rest here; for when we look at the evidence of the defendants, we find that Mr. Morgan, a gentleman of whose eminence I need not speak, took the bank-stock at the same sum of 200*l.* per cent, and he therefore was of opinion, not only that for the purpose of valuing a reversion in bank-stock a deduction ought to be made from the market price of the stock, but that the price at which Mr. Downes took it was the fair price at which it ought to be taken.

In the valuation made by Mr. Downes, the succession duty was not allowed for, the unascertained costs of the chancery suit were not made the subject of any deduction, and the powers of conversion during the lifetime of the tenant for life, and the expenses of the conversion and realization of the property at the death of the tenant for life, were not in any way taken into account. Now it is impossible to say that those circumstances would not materially affect the value of the reversion. Every one of the witnesses for the defendant states that the unascertained costs of the suit would have seriously affected the price, even if they would not have prevented any bidding, which many of these witnesses
 * 379 clearly are of opinion that they would. I think, therefore, upon the evidence for the defendants, it is clear that the 1500*l.* must have been the extreme value of the reversion.

[His Lordship then entered at some length into the evidence of the plaintiff's witnesses, stating his grounds for holding that it failed to displace that of the witnesses for the defendants. His Lordship observed upon their having all taken the bank-stock at the market price of 215*l.*, and having left out of consideration the costs of the chancery suit and the expenses of realizing the property at the death of the tenant for life. His Lordship also noticed, that none of the plaintiff's witnesses appeared to have allowed for the expenses of effecting an insurance to the full amount of the share, the reversion in which was purchased: making the following remarks upon the evidence of Mr. Shuttleworth, an eminent actuary, who had been examined for the plaintiff:] —

Mr. Shuttleworth says that, in making his calculation, he allowed only for the expense of effecting an insurance for the sum of 3000*l.* upon the life of the vendor against the life of the tenant for life. But the property, the reversion of which was sold, was worth nearly 5900*l.*, and the evidence shows that in the market it is understood that the price of a contingent reversion is estimated on the footing that the purchaser will insure to the full amount of the value of the property. Now, if the difference between the expense of insuring for 3000*l.* and insuring for 5900*l.* be deducted from Mr. Shuttleworth's valuation, it will be found that his valuation does not materially differ from that of Mr. Downes.

I have been struck in this case by the difference between the valuations made by the eminent actuaries who have given evidence on behalf of the plaintiff, and those made by the equally eminent actuaries who have * given evidence on behalf of the * 380 defendants. This difference, so far as it is not explained by the circumstances to which I have adverted, probably arises from this, that the witnesses have proceeded, so far as the table value has entered into their calculations, on different tables, the defendants' witnesses adopting the lower tables and the plaintiff's the higher ; but I certainly am not prepared to hold that a purchase of a reversion can be set aside because the purchaser has bought, so far as the table value has entered into the calculation, on the lower not the higher tables, where the tables on which he has bought are in common use. Upon the whole, I am satisfied that the defendants have established that the fair value was given by them for this reversion, and I am confirmed in that opinion by the undisputed facts which appear in the evidence, that the plaintiff had offered this reversion to other offices and had obtained no bidding for it, and that the plaintiff was offered to be released from the purchase and declined to accept the offer. Much reliance was placed on part of the plaintiff upon the case of *Edwards v. Burt*, but this case is very different from *Edwards v. Burt*. That was not a case which proceeded on a stated value of property. The conflict of evidence was much greater there than here ; and, in truth, that case amounts to no more than this, that the Court considered more weight to be due to the evidence on the part of the plaintiff than to the evidence on the part of the defendants. In this case I

have come to the opposite conclusion. I think, therefore, this appeal must be dismissed; but as my learned brother thinks no costs should be given beyond the deposit, I agree that it shall be so.

1862. January 11, 13. Before the LORDS JUSTICES.

Coal and iron works were demised, together with lands and mines under other lands not included in the demise, with liberty to the lessees to make and use "roads and ways" over any of the lands, and to do all such other acts upon the lands as should be necessary for the purposes of the works, and the lessees covenanted to uphold and keep in good repair the furnaces and other works, houses, and other buildings then standing and which during the term should be erected and built on the demised land and all other the demised premises, and at the expiration of the term to deliver up the property and "all ways and roads in, upon, or under the same lands" in such good order that the works might be continued by the lessor. *Held*, that this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, and that the landlord therefore was not entitled to an injunction to restrain the tenant from disposing of them during the term.

THIS was a motion to discharge an order of Vice-Chancellor STUART granting an injunction to restrain the defendant, who was a judgment creditor of an underlessee, from removing certain tram-plates and sleepers from property of which the plaintiffs were the lessors.

In 1801, the then Duke of Beaufort demised to Edward Kendall and Jonathan Kendall for seventy-seven years, a furnace for smelting iron, with other buildings and works known as the Clydac Iron Works, and certain lands and mines, with various powers and liberties for the purposes of carrying on the works and getting the minerals, "and also full and free liberty, license, power, and authority (so far as the said Henry Duke of Beaufort has right to grant the same) to make and use such roads and ways in, over, and upon the said lands hereby demised, and in, over, and upon any of the said waste lands or grounds hereinbefore particularly described (and whereof the coal and iron mines are hereby de-

mised), or any of the said other waste lands or grounds of the said Henry Duke of Beaufort in the parish of Llanelly aforesaid, as shall be found necessary or expedient for carrying and conveying the * coals and iron ore so to be raised and * 382 landed as aforesaid, and for the commodious carrying on of the said business of an iron master at and upon the said furnace, iron works and lands hereby demised; and also to do all such other acts, matters, and things whatsoever in and upon the said lands hereby demised, and in and upon the said waste lands or grounds hereinbefore particularly described (and whereof the coal and iron mines are hereby demised) or any part thereof, as shall or may be deemed necessary or expedient in or about or for the discovering, pursuing, scouring, and working of the said mines, veins, and seams of coal and iron ore hereby demised, and raising and leading the coals and iron ore therefrom, and for conveying such iron ore to the furnace or furnaces and other works on the said lands hereby demised and there smelting the same, and for carrying on the said business of an iron master at and upon the said furnace, iron works, and lands hereby demised in the usual and accustomed manner." The lease contained a covenant on the part of the lessees, that they would "from time to time, and at all times hereafter during the said term hereby granted, at their or some of their own proper costs and charges, well and sufficiently repair, amend, sustain, uphold, and keep in good repair, order, and condition all and singular the furnaces and other works, houses, and other buildings now standing or being and which at any time hereafter during the said term hereby granted shall or may be erected and built upon the said lands or grounds hereby demised or any part thereof, and also all and singular the gates, rails, stiles, bridges, ditches, fences, watercourses, flood-gates, and dam-heads of or belonging to the said hereby demised hereditaments and premises, and also all and every other part of the said hereby demised hereditaments and premises, in all respects, matters, and things whatsoever: provided always, nevertheless, * that the covenants herein contained respect- * 383 ing the repairs of the said premises shall not extend or be deemed or construed to extend in any manner to restrain the said Edward Kendall and Jonathan Kendall, their executors, administrators, or assigns, from pulling down all or any of the works and buildings hereby demised, or of the works and buildings which

shall or may hereafter be erected and built on the said land or ground hereby demised, or any part thereof respectively, for the purpose of rebuilding or altering the same, or of building others in their stead, so that the same shall be accordingly rebuilt or altered or others built in their stead, but merely to provide and secure to the said Henry Duke of Beaufort, his heirs and assigns, the means of preventing such works and buildings from becoming ruinous and going to decay." The lease also contained a covenant by the lessees that they, their executors, administrators or assigns, would at the end or other sooner determination of the term "peaceably and quietly surrender and yield up to the said Henry Duke of Beaufort, his heirs and assigns, all and singular the coal and iron works and mines, veins and seams of coal and iron ore, which shall be then working, or shall have been worked at any time within three years next preceding, in or under the lands hereby demised, and the said waste lands or grounds hereinbefore described, and also all pits and shafts which shall be then open, and also all adits, levels, gutters, drains, and watercourses, and all ways and roads in, upon, or under the same lands or grounds respectively, or any part thereof, in such good repair, order, state, and condition as that the said coal and iron works may be continued and carried on by said Henry Duke of Beaufort, his heirs or assigns; and also will at the expiration or other sooner determination of the said term leave and yield up unto and for

* 384 the said Henry Duke of Beaufort, his heirs or * assigns, all and singular the furnaces and other works, messuages, cottages, and other erections and buildings which shall, at any time during the last ten years of the said term hereby demised, be standing or in being upon the said lands or grounds hereby demised, or any part thereof, and also all the gates, rails, stiles, hedges, ditches, and fences upon or belonging thereto, in the like good order, repair, and condition."

The defendant was a judgment creditor of John Powell, an underlessee of the demised property, and had taken out execution. The bill was filed to prevent him from removing and disposing of certain tram-plates fixed upon iron and wooden sleepers, and the sleepers themselves, which the sheriff had seized. These tram-plates and sleepers had been laid down by the Kendalls after the granting of the lease, and had been bought and paid for by Powell when he took his underlease. The Court considered it clear upon

the evidence that they were merely laid upon the roads formed on the ground, and were not affixed to the freehold, and that there was no custom of the country entitling the landlord to claim them as part of the freehold. The question remained whether the terms of the lease were such as to bind the tenant to leave them. The Vice-Chancellor considered that the stipulations of the lease bound the tenant to keep them in repair and leave them for the benefit of the landlord, and that the underlessee, who had notice of the covenants in the lease, and his judgment creditor were in no better position, and he accordingly granted an injunction. The defendant appealed.

Sir H. M. Cairns and *Mr. Macnaghten*, for the appellant. — On the fair construction of this lease, there is no contract that tram-plates not affixed to the freehold shall *not be re- * 385 moved. There is no covenant in terms not to take them away. They are not part of the demised premises, since they were not on the property when the lease was granted and have not been affixed to the freehold, but are mere chattels. Chitty on Contracts: (a) they, therefore, are not included in the covenant to deliver up the demised premises. There is no covenant which can embrace them unless they are included in the words "roads and ways" in the covenant to deliver up possession. But "roads and ways" do not in their natural sense include tramways, which are mere movable chattels placed upon a road for the purpose of more conveniently using it, and they ought to be construed in their natural sense according to common usage. *Mallan v. May*. (b)

By the custom of the country, which is admissible on this question, roads and ways are not understood to include the trams and rails which make them into railroads and tramways. The plaintiff's construction of the lease leads to this monstrous conclusion, that the lessees would be bound to keep in repair throughout the whole term a tramway which might have become useless soon after its commencement, by reason of the mines to which it led having been worked out.

Mr. Malins and *Mr. Cracknall*, for the plaintiffs. — The lease gives a right to make roads and ways, which must include a right to make railroads and tramways, when it was expedient to do so, and

the covenant to leave all roads and ways in good repair must have the same extent. No such hardship as the defendant suggests could result, for the proviso in the covenant to repair, allows the tenant to remove any erections or fixtures from one part of * 386 the demised property to * another. Moreover, the tram-roads are included in the word "works" contained in the covenant to repair. *Lord Mansfield v. Blackburne*, (a) *Sunderland v. Newton*, (b) *Naylor v. Collinge*, (c) are in our favour. A lessee who covenants to leave all erections and buildings must leave them, though such as in the absence of such a covenant he would be entitled to remove as having been set up for trade purposes. *Martyr v. Bradley*. (d) The intention of the lease was that the works should be given up at the end of the term as a going concern, an object which is defeated if the tramways are made useless.

Sir H. M. Cairns, in reply. — The lease contains no demise of roads and ways, and it takes a distinction between "works" and "roads." The covenant to repair extends only to the demised premises. If it had been intended to include in the covenants of this lease any thing so utterly unattached to the freehold as tram-plates laid on the surface of a road, plainer words would have been used. The covenant to yield up applies only to things of a freehold nature, and it would be doing violence to its language to treat it as including chattels like these.

THE LORD JUSTICE KNIGHT BRUCE. — This case is one of an interlocutory injunction granted in these circumstances: By virtue of an execution against a defendant under a judgment at law, the defendant having been an underlessee of iron ores, coal works, and mineral property, the sheriff seized, among other goods, certain tram-plates and wooden sleepers on which the tram-plates lie or are fixed. The defendant, I have said, was an underlessee of * 387 the property where * these things were. The bill has been filed, and the injunction obtained by the head landlord on the ground, that if these tram-plates and sleepers are not fixed to the freehold and part of the freehold in the ordinary sense, they are still protected in his favour by the terms of the lease which he

(a) 6 Bing. N. C. 427.

(c) 1 Taunt. 19.

(b) 3 Sim. 450.

(d) 9 Bing. 24.

granted to the original lessees. The landlord's bill prayed an injunction accordingly in these terms, beyond which, as I understand, the injunction granted does not go : —

“ That the defendant, his servants, agents, and workmen, may be restrained by the order and injunction of this honourable Court from taking up, selling or removing the iron railroads and tram-ways now being in, upon, under, or about the said hereditaments demised by the said firstly hereinbefore-stated indenture of lease, or the coal or iron or other works authorized thereby or carried on under or by virtue thereof, or any part of the said iron railroads or tram-ways.”

It probably would be too narrow a construction of the injunction thus prayed to say that it does not extend to the wooden sleepers. I understand it as extending to them. The evidence before us satisfies me that, independently of any covenant in the particular case, the general law of the country has not given the landlord any such right. The evidence convinces me that the sleepers and tram-plates in question are not fixed to the freehold, but are to all intents and purposes, subject to any question that the terms of the lease may raise, the goods and chattels of the tenant (the defendant at law), and therefore liable to be seized by the sheriff under the execution against him. If, therefore, the case of the head landlord is to be considered as being put on any such right, I think that it wholly fails. As for the stone sleepers and the tram-plates lying on them, they may be placed out of the case, for, as I understand it, the defendant here, the plaintiff at law, is willing to undertake that he will not, and that the sheriff under his execution shall not, interfere * with any of the stone sleepers, * 388 or with the tram-plates lying on them.

The question, then, is reduced to the terms of the lease, and though, for the purpose of construing the particular covenant on which directly the controversy turns, the whole lease must be read, yet, as I have said, the right claimed is put directly and merely upon this covenant. [His Lordship read the covenant for delivering up the property on the determination of the lease.] Whether, for the purpose of interpreting this covenant, we look to the rest of the instrument or not, I am of opinion that, according to its true meaning, it does not extend to chattels of this description.

Neither under the word "works," nor under the word "ways," nor under the word "roads," nor under all three together, are, in my opinion, movable chattels of this kind comprised, nor were they, as I consider this instrument, intended to be so comprised. It may be the duty of the tenant, at the end of the term, to leave the roadway in good order and condition, but the question is, whether it is his duty, according to this lease, leaving the road in good order and condition, to leave upon it the sleepers and tram-plates, movable as they are, without which I agree it cannot be conveniently used, or cannot be at all used as a tram-road or railway. That, in my opinion, is not the meaning of the covenant. The parties did not, as I read the instrument, intend to interfere with the right of the tenant to remove, or do what he would with what were only movable chattels used by him for the more convenient use of the tram-road. That is my exposition of the covenant which we are here asked to construe, and, I think, therefore, and my learned brother agrees with me, that we ought to act upon that interpretation. This, however, will not affect any right of action which, at the end of the

* 389 term or * otherwise, the landlord or his representative may have against the original lessees or their representatives, or against any other person. That right of action will remain; but to give a title to maintain the present injunction it is necessary, as I apprehend, that we should read the covenant in the manner in which the plaintiff asks us to read it. The construction which the plaintiff seeks to put upon it appears to me to contradict in spirit, if not in letter, the meaning of the whole instrument, and I consider, therefore, that the injunction ought not to stand. With regard to the costs of the motion before the Vice-Chancellor and the motion here, my impression is, that they ought to be costs in the cause.

THE LORD JUSTICE TURNER. — I take precisely the same view of this case. So far as respects the stone sleepers and the trams resting upon them, I think that there was no case for granting an injunction, because the defendant had, as I understand the case, before the hearing of the motion, disclaimed any right to interfere with them. So far as respects the iron sleepers, or the wooden sleepers, and the trams resting upon those sleepers, I am of opinion that there was no case for this injunction, upon the grounds which I am about to state.

I think it material, in the first place, to consider whether these

tram-plates and sleepers were or were not affixed to the freehold. If they were not affixed to the freehold, they were trade personal chattels of the lessee, belonging to him, brought by him upon the trade premises, continuing to belong to him, and, according to the general law, removable by him during the term.¹ If they were trade personal chattels, it lies upon the landlord to prove a custom preventing the tenant from removing them, or to show that the terms of the lease prohibit such removal.

There certainly is no evidence of any such custom (if such custom there could be), and the lease ought not to receive a strained construction for the purpose of including within its terms trade personal chattels, so as to prevent the tenant from removing them, as in the ordinary course of law he would be entitled to do. A lease ought not, I think, to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels, unless such an intention is clearly expressed.

On both views of the case, therefore, it appears to me material to consider the question, whether these sleepers and trams were or were not affixed to the freehold; and I think it is perfectly clear upon the evidence that they were not so affixed. The evidence upon the subject seems to me to be all one way, for though we have two witnesses on the part of the plaintiff who speak of them as affixed to the freehold, it is perfectly plain, when their evidence is examined, that what they mean by affixed to the freehold is merely that they are sunk in the soil by the pressure of the waggon's passing over them.

The plaintiff's case, therefore, must rest, as indeed it was mainly put in the argument, upon the construction of the covenants in the lease, and on this point the case is put thus: it is said, there is first a liberty granted by the lessor to the tenant to make roads or ways; then there is a covenant by the tenant with the lessor to repair, sustain, and uphold the roads and ways which are so made by the tenant; then there is a proviso at the end of that covenant, which would enable the tenant from time to time to remove from one part of the premises to another part of the premises the trams which may be laid down for the purpose of making these roads or ways, but no provision enabling him to remove the tram-plates off the premises; and, lastly, it is

¹ See *Kerr Inj.* 252-255; *Chitty Contr.* (9th Eng. ed.) 330 *et seq.* (10th Am. ed.) 373 *et seq.*, and notes.

said, that there is a covenant that the lessee will at the expiration of the lease deliver up these roads and ways so that the lessor may be enabled to continue and carry on the works. From these premises this conclusion is deduced, that the railroads or tram-ways made and used by the tenants were to be kept up by them, subject of course to the power of removal which I have mentioned, but with no further power of removal, and were to be delivered up to the plaintiff at the expiration of the term, the plaintiff it is said being entitled to come into the possession of these works as a going concern. The argument was attempted to be strengthened by a fact, which is alleged by the plaintiff in his bill, and which, for the purpose of the argument, I assume to be correctly alleged, that there were railroads or tram-ways upon the premises at the date of the lease. Now, I think, upon considering these arguments, that the conclusion which is contended for by the plaintiff is not warranted by the premises from which it is attempted to be deduced. We have not here to deal with the railroads or tram-ways which existed at the date of the lease. There is no question before us upon them, and the fact of their existence does not seem to me to help the plaintiff's contention, because I think it may well be contended, that those particular railroads or tram-ways which were existing at the date of the lease may have been included in and demised by the lease. The lease was of the lands including the iron works, together with the appurtenances to the lands, works, and premises; and the roads, which were in use at the date of the lease for the purpose of the works, might well be considered as being appurtenant to the works themselves, and, therefore, included in the demise. Those railroads and tram-ways, therefore,

* 392 which were existing at the * date of the lease would stand upon a different footing from the railroads or tram-ways which were made by the tenant after the commencement of the lease; and whatever obligations might rest upon the tenant with reference to the railroads and tram-ways which existed at the date of the lease, it does not follow that the same obligations were meant to be imposed upon him with reference to those made by himself during the continuance of the lease.

We must, therefore, I think, consider the several grounds upon which the plaintiff relies, without reference to the question of the existence or non-existence of railroads and tram-ways at the time when the lease was granted. And, first, we have a liberty given by

the landlord to the tenant to make and use roads and ways. [His Lordship here read the grant of such liberty.] Now, the first question here is, What is the meaning of the words "roads and ways," as used in this grant of liberty to make and use them? It is true that every railroad and every tram-way is a road or way; but it is certainly not true that every road or way is a railroad or a tram-way; and, in the ordinary course of making a railroad or tram-way, the road or way is in the first instance laid down, and then it is converted into a railroad or a tram-way by the rails or the trams being laid down upon the road or way which has first been formed for the purpose of receiving them. Indeed it is common in speaking of an unfinished railway to say that the road has been made, but that the rails have not been laid down. It is quite clear, therefore, as it seems to me, that "roads and ways" would not in all cases extend to railroads or tram-ways, and I apprehend, therefore, it must depend upon the nature and purposes of the instrument, taken in connection with such evidence as may be receivable upon the subject, whether upon its true construction, * the words "roads and ways" as there used * 393 were or were not intended to include and extend to railroads or tram-ways. The evidence on this point is clearly in favour of the defendant. But if we look at the case, even without reference to the evidence, how does it stand? This is a grant of liberty by a landlord to a tenant, and it is therefore *prima facie* to be presumed, as I think, that it relates to a liberty to do an act in which the landlord was interested, and by which his rights were affected. Now it is clear that he was greatly interested in the making of the roads or ways, without which, no doubt, the tram-ways could not be made; but it is difficult to see of what importance it could be to the landlord, so far as the purposes of this grant are concerned, whether the rails or trams were or were not afterwards laid down on the road or way when made. But it is said that this, being the grant of the lessor, is to be construed most strongly against him, and that therefore it ought to be taken to include of necessity the right to lay down these rails and trams, so as to prevent there being any doubt upon that right. And this probably would be so if the question had rested merely upon the words granting the liberty to make and use roads and ways; but this grant is followed up by words giving the tenant liberty to do all such other acts, matters, and things whatsoever in and upon the

demised lands, and in and upon the waste lands thereinbefore particularly described, or any part thereof, as should be deemed necessary or expedient for (among other purposes) "conveying the iron ore to the furnaces and other works on the lands." It seems to me that this part of the grant draws the distinction between the right to make the roads and ways, and the right to do acts upon those roads and ways which shall be convenient for the purposes of conveying the iron ore to the smelting house. I think, * 394 therefore, that "roads and * ways," as used in this part of the deed, could hardly, upon a fair reading of the deed, be meant to include railroads and tram-ways. I think that, if it had been intended so to include them, such intention would have been much more clearly expressed upon the face of the instrument, and I think so the more from this fact, that, according to the statement on the part of the plaintiffs, there were actually existing railroads or tram-ways upon these premises at the time when the lease was granted.

Supposing, however, that railroads and tram-ways are included in the words "roads and ways" as used in the grant of this liberty, was it or not incumbent on the lessee to keep them in repair? The covenant as to repairs is as follows: [His Lordship read the covenant.] Now it is clear that the tram-plates and sleepers in question are not part of the demised premises, and, therefore, if they are included at all in the covenant to repair, it must be under the word "works." But that word must be construed in connection with the other words, with which it is immediately joined, "furnaces and other works, houses and other buildings." Upon referring to the other parts of the lease it will be found that this description, in a great degree, runs through the whole of the instrument; and I think that the word "works" was not intended to refer to any such works as mere temporary works of the tenant not affixed to the freehold, and laid down by him only for the purpose of the more convenient transport of the iron ore from the mine to the smelting-house, but that it was intended to refer to permanent and substantial works, similar in their nature to the furnaces, houses, and other buildings which are spoken of. This is the more clear from the use of the words "erected and built," words which could not be applied to a * 395 railroad or a tram-way of this description. * But if there were more doubt as to the fair construction of the words, it

would be material to see the consequences of adopting the construction contended for by the plaintiff. This is a lease for a term of seventy-eight years from the year 1801, not expiring, therefore, until the year 1879. Now, suppose that within two or three years after the granting of the lease the tenant, having, for the purpose of working the minerals in one part of the large extent of country over which the grant of these mines extends, made a road and laid down tram-plates for the convenient transport of the minerals to be raised from part of the mine, had worked out the ore from that part of the mine: is it to be contended on the part of the landlord that the true meaning of this lease was, that those tram-plates were to remain on the ground useless to the lessee during the whole period of the continuance of the lease, in order to be given up to the landlord at its expiration, by which time they would have become utterly worthless and useless to him? But yet that is the necessary consequence, as it seems to me, of holding that this covenant to repair extended to roads and ways of this description, because the obligation is not merely to repair, but it is to sustain and uphold them, and the lessee, therefore, could not, according to the strict legal construction, as I apprehend, of the covenant, after having once laid down these tram-plates, if they are within the range of the covenant at all, afterwards take them up again. The weight of that argument seemed to be felt very much on the part of the plaintiffs, for it was endeavoured on their part to escape from the difficulty by saying that the lease does not prevent the tenants from removing the tram-plates from one part of the mine to another part of the mine, but only prevents their removing them off the mine altogether. But where is that to be found in the lease? The plaintiffs, in support of that part of their case, rely upon the proviso * at the close of the covenant to repair. [His Lordship read the proviso.] Now I think it perfectly clear that this proviso has not the slightest reference to roads or ways, or to any thing which may be done by the tenant in laying down tram-plates for the purpose of constituting railroads or tram-ways. It is a proviso which clearly refers to works and buildings which are capable of being erected and built, and in lieu of which, if pulled down, other works and buildings are to be erected and built; and, therefore, if this proviso does not, as

• I think it clearly does not, extend to the removal of the tram-

plates, the consequence which I have pointed out upon the earlier part of the covenant to repair must necessarily result.

Then in coming to the consideration of the last clause, on which the plaintiffs rely, we enter upon it subject to the following considerations, first, that, to say the least, it is exceedingly doubtful whether the words "roads or ways," as contained in the liberty granted, were at all intended to apply to railroads or tram-ways of this description laid down by the tenant. But if they were, I take it to be clear, that there was no obligation imposed upon the tenant to keep them in repair. We then have a covenant by the lessee to yield up to the lessor all and singular the coal and iron works, veins and seams of coal, and all pits and shafts which should be then opened, "and all adits, levels, gutters, drains, and watercourses, and all ways and roads in, upon, or under the same lands or grounds respectively, or any part thereof, in such good repair, order, state, and condition as that the said coal and iron works may be continued and carried on" by the lessor, his heirs or assigns. Now, if the tenant was not bound to maintain roads or ways of this description, which he had laid down, how can it be

within the meaning of this covenant that he was bound
* 397 * to deliver them up at the expiration of the term? If, therefore, I am right in the construction of the covenant to repair, it seems to me necessarily to follow that these roads and ways, movable as they are, would not be within the meaning of this covenant to deliver up. There is, it is to be observed, an express covenant, which follows upon this, to leave "the furnaces and other works, messuages, cottages, and other erections and buildings which should at any time during the last ten years of the said term thereby demised be standing or in being upon the said lands or grounds." It cannot be said, therefore, that you must imply a covenant to yield up other matters than those which are the subject of express covenant. The whole argument on this part of the case, therefore, really resolves itself into the last few words of that covenant, that the premises are to be yielded up in such good order, state, and condition, as that the coal and iron works may be continued and carried on by the duke. Now, does that mean of necessity that they are to be yielded up with the rails and tram-plates which may be laid down by the tenant, and which, according to the ordinary course of law, the tenant would be

entitled to remove; or does it mean this, that the roads and ways themselves are to be yielded up, leaving it to the tenant to remove the tram-plates which he may have laid down? Was it meant that the duke was to be entitled to take as his own that property which, in the ordinary course of law, belonged to the tenant; or was it simply meant that he should have those roads and ways in which he was interested, and which had been made under the grant by which he had given liberty to make them, delivered up to him in good repair, so that he might be enabled to continue the works by placing the tram-ways upon them, which should enable the works to be conveniently carried on? I think it clear that the latter is the true meaning of *this covenant, that * 398 it extends only to the delivery up of the roads and ways in good repair without the plant which had been laid down upon them; and that the injunction ought to be dissolved. I agree as to the costs.

OLDFIELD v. PRESTON.

1861. December 13, 14. 1862. January 15. Before the LORDS JUSTICES.

A capital fund was formed by subscriptions upon lives, each subscriber subscribing upon the life of a nominee. The income was yearly to be divided ratably among those subscribers whose nominees were then living, and as soon as the number of nominees was so far reduced by death that the capital would give not less than 1000*l.* for each share, the fund was to be divided among the subscribers whose nominees were living. The capital became divisible after the passing of the Succession Duty Act, *Held*, that no succession duty was payable.

Per the Lord Justice TURNER, *semble*, succession duty would have been payable but for the saving in the 17th section of the Act.

Per the Lord Justice TURNER, the 17th section is not confined to cases where the relation of debtor and creditor exists between the parties, but extends to every case of a contract *bonâ fide* for valuable consideration in money or money's worth for the payment of money or money's worth after the death of another person.

THIS was a petition presented by some of forty-six subscribers to the first class of the Doncaster Universal Tontine, who had obtained a decree by which it was established that those forty-six subscribers were entitled in equal shares to the sum of 46,000*l.*

3*l.* per cent consols, the amount of the funds produced by the investment of the subscriptions to the first class of the tontine; and the petition prayed that it might be declared whether any and what succession duty was payable in respect of this fund of 46,000*l.* 3*l.* per cent consols.

The tontine was founded on the 1st of September, 1788, and by the deed of constitution of that date it was amongst other things provided, that the tontine should be open to subscriptions on lives of whatever ages in being on that day, according to a scale of value set forth in the deed, the scale varying according to the ages of the lives on which the subscription should be made;

* 399 that the * subscribers might subscribe optionally on their own or on any other life or lives respectively, with provisions for several subscriptions on the same life or lives, and for dividing the tontine into several classes, each of which was to be a separate tontine on the several concurrent lives concerned therein respectively; that there should be a committee of directors and managers for the conduct and execution of the tontine; that the subscriptions, as they should come in, after payment of the expenses of management as thereafter mentioned, should be funded in the 3*l.* per cent consols, there to remain invested until final partition, in the names of some of the directors for the time being, and should be so acknowledged; and that each subscriber, on payment of his or her subscription or subscriptions, should become a proprietary member of the tontine for and according to his subscription or subscriptions, and within its rules and provision to all intents and purposes; "that the net annual dividends, interest, or produce from the funded capital, subject to the charges and expenses attending the management of the tontine, shall be partable on the 29th, or, if that day fall on Sunday, then on the 28th day of August, but shall be payable from the 20th of September until the end of December in every year equally on all the then existing lives, and on those which may have lapsed within the year last foregoing, distributively in and according to the several tontine classes; and such like yearly distributive partition shall proceed with regard to each respective class until it shall be found and declared by the committee, either that the sum of the funded capital thereof can yield on division 1000*l.* at least of such 3*l.* per cent stock on each then surviving life therein, or else that the class (if its capital shall happen to have been too small for

such division thereof on lives) hath then become reduced to one sole surviving life, at which * prescribed period, so * 400 to be ascertained with regard to each class as aforesaid, the respective proprietors' rights to partition or to sole property, as the case may be, of and in the capital stock thereof, shall vest and take place, and the same shall with all timely speed be divided or transferred and rendered accordingly." There were also provisions in the deed for proprietors transferring their interests; for annual meetings of the committee to audit the accounts and declare the dividends, both intermediate and final; for forfeiture of the interests of proprietors in certain cases mentioned in the deed; for dividends unproved or unclaimed falling into the common stock for the general benefit, and for all contingent accessions, accruing by forfeiture, non-claim or otherwise, being applied in aid of the annual dividends or funded as additional stock, at the discretion of the committee.

The first class of the tontine consisted of shares subscribed for on lives under the age of one year; 864 such shares were taken, and the investment of the subscriptions after deducting expenses produced 46,000*l.* consols.

At the time when the Succession Duty Act, 16 & 17 Vict. c. 51, came into operation, the number of lives in this class was reduced to seventy-nine. In June, 1860, when the suit was instituted, it was reduced to forty-six, and so the fund became divisible, the number of lives having been reduced so that the share of each would be 1000*l.* The question raised by the petition was, whether the forty-six shareholders, among whom the fund had thus become divisible, were liable to any, and if any what, succession duty on their shares.

* A point also was raised as to the share of a Mr. John * 401 Charlesworth, the facts relative to which did not appear on the petition. A Mr. Charlesworth subscribed for three shares, which were taken in the names and on the lives of his three infant children respectively. Two of the three died before the passing of the Succession Duty Act, but John Charlesworth, the third of them, was one of the forty-six survivors, and so one of the persons entitled to share in the 46,000*l.* consols.

The Solicitor-General (Sir R. PALMER) and *Mr. Hanson*, for the Crown. — The case depends on the 2d, 3d, and 5th sections of the

Succession Duty Act, taken in connection with the 12th & 13th. By the 2d section the subject called a "succession" is defined. The 5th section shows that the accretion of an additional interest upon death to a person who already has some interest is a succession within the meaning of the 2d section. The 13th section provides for the case where the successor derives his succession from more persons than one and the proportional parts cannot be distinguished. These three sections taken together meet the present case, unless the Court should be of opinion that it comes within the 3d section, which will be considered presently. Taking the case apart from that section, here was a deed executed by a number of persons, which made a settlement of the aggregate fund contributed by those persons, and that settlement was such that upon the death of each of the *cestuis que vie* (who might or might not be the same persons as those who were beneficially interested), there was to be an accruer or accretion of additional interest to the persons who were entitled to the shares of the surviving *cestuis que vie*. That was, under the 5th section, an increase of benefit accruing to those persons upon the determination of the interest

* 402 of the * person whose interest depended on the life that was gone, and that, by the 5th section, is distinctly made a succession. Suppose, to put a simple case, that the deed had been executed immediately before the passing of the Act, and that only three persons, A., B., and C., were nominated under it, and that A. died after the passing of the Act. Thereupon the interest of B. and C. would become increased by the accretion of what previously belonged to A., whose interest was determined on his death. That is a *primâ facie* case for inquiry who is the predecessor, making B. and C. the successors chargeable with duty under the Act. Should there be any difficulty arising in ascertaining the predecessor, in consequence of its being a joint fund, the 13th section meets the case; we submit, however, that there is no such difficulty. Supposing A., B., and C. to have contributed the fund in equal shares, the interest accruing to B. and C. on the death of A. is plainly derived from A., and so if there be any number of deaths, the accretion of interest to each person who is living when a death takes place is derived from the original contributors other than himself.

[THE LORD JUSTICE TURNER. — How would it be if a contributor died before the Act came into operation?]

That would not affect the case unless the fund became divisible on his death, for the original settlor is the predecessor according to the 2d section of the Act, as was decided in *Lord Saltoun v. Her Majesty's Advocate-General for Scotland*. (a) There are some cases on these sections which are material, as showing how the Courts have dealt with successions under instruments to which various persons have been parties and where a valuable consideration has intervened. In *Lord Braybrooke's Case*, (b) a father, tenant for life, and eldest son, tenant in tail in remainder, * joined in resettling the estate, and it was held that the * 403 son's estate was derived out of his prior estate tail. The present is not a case of resettlement, but the same principle applies, that you are to look to the prior state of the title to ascertain from whom the interest which accrues to the successor is derived, who it was that brought into the stock that particular interest which has accrued. Now if the survivors retain the interest which they originally enjoyed in respect of what they bought in, it is clear that the accruer, which takes place upon the death of any of those who die, can only be the accruer of an interest originally brought in by those who are dead. *Re Ramsay's Settlement*, (c) illustrates the principle on which the Court proceeds in determining who is the predecessor. In that case, by a marriage settlement, the husband's estate, upon the failure or determination of the limitations in favour of the husband, wife, and issue, was limited to the wife's relations. The wife's relations came into possession and contended that the wife, having given valuable consideration for the settlement, was the predecessor, but it was held that the husband, from whom the estate came, was the predecessor, and that 10l. per cent was payable. So here, where a joint stock is made to which each person contributes a distinguishable portion, and it is subjected to a settlement which carries over the share of each person to the survivors, the person who contributed that share is the predecessor. If the Court should hold the 3rd section of the Act to be applicable, the result will not be materially different. Whether that section applies appears to depend on the sense to be given to the word "jointly." If the word is confined to a strict joint tenancy, probably this case may be held not to fall within the section, since here the accruer was not on the death of the persons * beneficially entitled, but of the *cestuis que vie*. * 404

(a) 3 Macq. 659.

(b) 9 H. L. Cas. 150.

(c) 30 Beav. 75.

If, however, the word is to be taken in the large and popular sense, then the case comes within the section, and the only difference will be, that not the persons who originally settled the fund, but the persons from whom the accrued interest passed to the successors, will be considered the predecessors. It will be observed that under this contract there were two kinds of accruer on each death which took place between the passing of the Act and the time when the members were reduced to forty-six, there was a succession both to those members of the class who afterwards died before the number was reduced to forty-six and to those who ultimately became entitled to receive a share of the capital. The persons who died before the number was reduced to forty-six would be liable to duty only on an accruer of income, and that duty would not be a charge upon the fund now remaining for distribution. But as regards the succession to the capital, we say that duty is payable on all the accrued shares, and is to be calculated according to the relationship between the persons who subscribe for those shares and the persons who take them by accruer. If I subscribe 100*l.* and am one of the last survivors, I pay no duty on that 100*l.*; but if I take 900*l.* more by accruer, I take it as a succession derived from the persons who subscribed it. If A. settles a fund upon trust for himself during the joint lives of himself and B., with remainder to the survivor of them, and B. makes a similar settlement of another fund, it is clear that if B. is the survivor he must pay succession duty on A.'s fund as a succession derived from A. If, then, A. and B. contribute equally to form a joint fund, the income of which is to be divided between them during their joint lives and the capital is to go to the survivor, the principle is the same, the survivor must pay on half the fund as a succession derived from the other.

* 405 Then what difference * can it make that the fund is contributed by a greater number of persons. Another possible view may be suggested, that, by the terms of the original dispositions, each party made himself a settlor, not only of his own original subscription, but of every thing which might accrue to him, and the forty-six survivors would take their successions from the last deceased of the others. We do not contend that this is the correct view, but we submit with confidence that if it be not, the original subscribers must be considered the predecessors. We do not claim duty on any accruer which took place before the passing

of the Act, and the result, taking the figures of the case, is this: There were 364 original subscribers, 285 died before the Act and 33 since, 46 being now living. These 46 have since the Act had an accruer of $\frac{4}{3}$ ths of the fund, and it is on this we claim duty as an interest derived from the other 818 of the original subscribers.

Mr. Elmsley and *Mr. Wickens*, for the plaintiffs. — We contend that no duty at all is payable. The nature of the instrument was this: each party contributing a sum of money, they all agreed that when the *cestuis que vie* were reduced to forty-six, the fund should be divisible among those who held the shares depending on the lives of the surviving *cestuis que vie*. This, therefore, was a purchase by one from the others of the chance which each proprietor might have of his nominee being one of the forty-six survivors; it was not a disposition or settlement. The 17th section of the Act, relating to bonds and contracts (a) is, as we submit, * the one by which the case is governed. The case is very * 406 analogous to that of a policy of assurance in which the whole body of subscribers would be the assurers, and the persons whose nominees were the survivors the assured. That, according to the 17th section, would not create the relation of predecessor and successor. The latter part of the section, relating to bonds and contracts, is expressly opposed to the case of the Crown, the present being a case of a contract entered into for money or money's worth, for the payment of money or money's worth.

Now, as to the argument resting upon the 2d, 3d, 10th, and 13th sections. The 3d section is out of the case, for there clearly was no joint tenancy here. The 2d section was principally relied on. Upon it the question arises, whether the words "beneficially entitled upon the death" relate to becoming entitled in right upon the death, or entitled in possession on the death. The point has been

(a) "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession."

much discussed; and Vice-Chancellor KINDERSLEY held, that the words were so ambiguous that he could not hold duty to be payable on the ground that they referred to becoming entitled in possession upon the death. *Wilcox v. Smith.* (a) The Vice-Chancellor decided that case in favour of the Crown upon other grounds which do not exist in the present case. The 5th * 407 section does not advance the case of * the Crown, for nobody here had a charge or interest, unless the chance of their nominees being among the ultimate survivors be called a charge or interest. The 13th section carries the case no further, for it is governed by the words "where the successor shall derive his interest from more predecessors than one," assuming the relation to exist, which is the very point in dispute here. The case of the Crown, therefore, must rest upon the 2d section alone, the applicability of which to the case is not clear enough to charge the subject with duty. As regards the increase of income by the dropping of each successive life, it was clearly of less value than 100*l.* to each shareholder, and therefore is exempted from duty by the 18th section.

Mr. Hingeston, for a respondent in the same interest as the petitioners.

Mr. W. M. James and *Mr. Rendall*, for other parties in the same interest. — We contend that the Succession Duty Act was intended to meet two classes of cases, that of simple devolution by act of law from ancestor to heir, and that of provisions derived from the bounty of some person who makes dispositions dependent on the death of himself or of some one else, and that it was not intended to apply to any transaction which, whatever be its form, was in substance a purchase for money or money's worth, and this view is recognized by the authorities on the subject. The first part of the 2d section is, indeed, in the widest terms, but it must be read with reference to the following words, which show that it can only relate to something derived from a person who can be called, in the ordinary use of language, "the settlor, disponent, testator, obligor, ancestor, or other person from whom * 408 * the interest of the successor is or shall be derived." In all these cases, the predecessor is not the person who merely conveys the property, but the person who provides the subject of

(a) 4 Drew. 40.

the disposition. Thus, if A. buys an estate from B. and takes the conveyance to the use of himself for life with remainder to his son, the son takes a succession from A., not from B., though B. was the conveying party. This principle governed the decisions in *Lord Saltoun's Case*. There, a majority of the Scotch Judges held that the predecessor was the last preceding tenant in tail, from whom, according to the technical rules of Scotch law, the estates descended to the successor; but this was reversed in the House of Lords, and it was held that the case was not to be determined upon technical principles, but on the broad ground that the person from whose bounty the estate came to the successor was to be treated as the predecessor. So in *Lord Braybrooke's Case*, where a father, tenant for life, and a son tenant in tail, resettled the estate, the father taking back a life-estate, it was held that the succession of the son was derived from the original settlor, and not under a disposition made by the father and son, for the bounty came from the settlor. The 17th section applies to every case of purchase for money or money's worth, and, combined with the 12th, entirely takes out of the 2d section all such cases, for the 12th section provides that a man shall not be liable to duty on a succession derived from himself, but if a person pays for an estate, the disposition is made by himself. Of course this does not apply to the purchase of a reversion already existing, in which case a succession has already been created, and the purchaser comes in the place of the original successor. To put a simple case, if I bargain for money with A., an owner in fee, that after his death I shall have the estate, I contend that no duty is payable, for A. is not the person creating the succession, * and I cannot * 409 be charged under a disposition made by myself. The Act was not intended to apply to *bonâ fide* sales, not being purchases of existing reversionary interests. There are provisions in the 7th and 8th sections to meet the case of colourable sales made for the purpose of evading the duty. Now, with respect to the extent of the 17th section, the reference to a policy of insurance furnishes a key to the whole. Take the case of a mutual insurance company. The sum insured is payable out of funds contributed by the insured themselves, and there is no personal liability, the form of policy now in use always providing for payment out of the funds only; this by the express words of the Act does not create a succession. If this does not, there is no satisfactory reason to be given why a

shareholder in a tontine should be held liable to duty, and there is no ground for putting on the latter part of the clause a forcedly narrow construction for the purpose of making him liable. He has paid his money to a partnership upon a contract that, in a certain event, the partnership shall pay him a certain sum; that is a contract for payment of money, and the transfer of stock must, for the purposes of the Act, be deemed a payment of money's worth. The object of the Act was to provide not merely that the relation of debtor and creditor should not constitute the relation of predecessor and successor, but that the relation of vendor and purchaser should not. *Re Jenkinson* (a) is in our favour, as also *Attorney-General v. Yelverton*. (b) The 3d section hardly requires notice. It proceeds upon an intelligible ground, that where a joint tenant does not sever the joint tenancy, the interest accruing to his survivor may, in some sense, be considered as derived from his bounty.

The section, however, in no way applies to the present case, * 410 which is not one of joint tenancy. The * 5th section also is not applicable, for here the surviving shareholders had not property "subject to any charge, estate, or interest determinable by the death of any person," &c. Each of them had a share, and the shares of other persons have come to them upon certain contingencies. The section was intended to apply to cases where a successor comes into the possession of a property subject to a charge which diminishes its value, and so that section has not any bearing upon the present question. If, however, the Court is against us on the above points, we say that no duty is payable on the ground that the original subscribers are the predecessors, and that each subscribed less than 100*l*.

Mr. Giffard and *Mr. Rasch*, for other parties in the same interest. — If duty be payable, we contend that there must be an allowance for the income which the survivors lose on the interest falling into possession, as in *Lord Braybrooke's Case*. But we contend that no duty at all is payable. Each subscriber undoubtedly paid his money on a contract, and the nature of that contract was this: each person contracts for a valuable consideration in money that if he is not the survivor the whole sum shall be paid to some one else. That we say is a contract coming within the 17th section. The counsel for the Crown hardly venture to rely much on the

(a) 24 Beav. 64.

(b) 7 H. & N. 306.

8d or 5th sections, but are driven to the 2d. Now, to bring the case within that section, they must contend that every vendor of an interest expectant on his own death is, for the purpose of succession duty, the settlor.

Mr. T. Hughes and Mr. J. T. Humphry, for other parties.

* *Mr. Hobhouse*, for John Charlesworth. — The father of * 411 my client and of his brother and sister bought their shares for them as an advancement, and I contend that they are their own predecessors as to what was so purchased. The subject of purchase was the contingent benefit which they would obtain in the event of their surviving; this was purchased by them for their own benefit, so they and not the persons with whom they contracted were the settlors.

Mr. Bagshawe, Jr., for another of the respondents. — “Person” in the 12th section, by virtue of the interpretation clause, includes a society. This is a disposition made by the society. The society becomes entitled under a disposition made by itself, and is not liable to duty.

Mr. Chapman Barber, for other parties.

The Solicitor-General, in reply. — As regards the case of John Charlesworth, he is liable to duty, even if none of the other shareholders are, for he takes not under a purchase by himself, but by virtue of a purchase made by his father, and, therefore, cannot avail himself of the argument urged on the part of the other shareholders. If that argument succeeds, then John Charlesworth must be held to take under a disposition made by his father, and so must be liable to duty on all interest accrued since the passing of the Act. This is in accordance with *Re Jenkinson* and *Attorney-General v. Yelverton*, where a person contracted with another for valuable consideration for the payment of money after a death, and voluntarily assigned the benefit of that contract, and it was held that the assignee was liable to duty, though the assignor would not have been; *Ramsay's Case* supports the same view. It is not disputed that if purchase were out of the question a disposition * of the nature of that contained in the deed * 412 of this society would confer taxable successions on the sur-

vivors, and if the purchase makes any difference it can only make it in favour of the person who pays the purchase-money, not in favour of a person who takes by his bounty.

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose that the children had been adult in 1788, and that their father had given them the money to buy the shares in their own names, in that case, supposing the petitioners to be right in their general argument, would the duty attach?]

That change of circumstances would place the Charlesworths on the same footing as other shareholders; they would in that case have been themselves the purchasers. But where the father pays the money, the child being no party to the transaction, it is impossible to distinguish the case of a purchase at once in the child's name from that of a purchase in the father's name and a contemporaneous transfer to the child, as in *Re Jenkinson* and *Attorney-General v. Yelverton*.

Now as to the general argument, I say that there is no foundation in the Act for the distinction drawn on the other side. The Act does not say that the subjects of taxation are settlements by way of bounty, but "every past or future disposition of property," &c., which refers equally to dispositions for value or without value. Then as to the part of the 2d clause which defines the word "predecessor," there is nothing in it to exclude settlements for value, and they cannot be excluded unless something can be found in the subsequent special clauses of the Act to take them out of the 2d section. There is no authority in support of such an argument. In *Lord Salloun's Case*, the point whether the settlement was for value or not was not referred to, the question simply being, whether the last possessor was to be treated as the

* 413 predecessor. So in *Lord Braybrooke's Case* the point did not arise. Now, do the subsequent clauses take a case like this out of the Act? Three have been referred to, the 7th, 12th and 17th. Let us first take the 7th, which is of importance as showing how far the legislature meant to go in the way of exemption. Consider, with reference to that clause, the case put on the other side of an agreement between the owners of Blackacre and Greenacre, that both shall belong to the survivor. Such an agreement creates a contingent interest expectant on death, and so is

not within the exemption of this clause, which deals only with the case of a sale *in presenti*, reserving some benefit to the grantor, not with the sale of a reversion or the creation for value of a reversionary interest. The words relating to "a *bond fide* sale" do not occur any where else in the Act; an exception of very limited extent applicable to *bond fide* sales is introduced, which shows an intention not to except *bond fide* sales generally. Then as regards the 12th section, it is impossible to hold that these persons take under a disposition made by themselves, and the cases of *Jenkinson*, *Yelverton*, and *Ramsay* give no countenance to such a view. Where a person makes a settlement of his property, giving interests expectant on death, succession duty attaches, whatever be his motive for making the settlement. Now as to the 17th section, that section is an exception; and as the words imposing the duty in the 2d section are clear, it lies upon those seeking to avoid the duty to bring themselves clearly within the exception. Now, in that section, all the words point at instruments binding a person to make a payment when death occurs. A contract like that we are considering cannot, without straining language, be considered as a contract by subscriber A. to pay money to subscriber B. on the death of some person. No subscriber enters into a contract to pay any thing on the death of any person, but * brings in his money at once, and a common fund is made * 414 up, which is settled so as to give to a contingent class future interests expectant on death. The section evidently is intended to prevent a debtor from being made the predecessor of his creditor: *Jenkinson's Case* and *Yelverson's Case* were cases of direct contract for payment of money upon death. As to the argument that each share was less than 100*l.*, the value of a succession must be ascertained when the succession passes. Now each share was 120*l.* stock, which ever since the time when the Act came into operation has always been worth more than 100*l.*

Judgment reserved.

1862. January 15.

The Lord Justice TURNER, after stating the provisions of the deed, proceeded as follows:—

This deed of constitution is a deed prescribing and directing the investment and devolution of the subscriptions to the several

classes of the tontine, and in that sense, no doubt, it is, as it was contended on the part of the Crown to be, a deed of disposition and settlement; but it is obvious, as it seems to me, that the deed assumed this shape only because the object of the subscribers to the tontine could not be carried into effect in any other mode. Neither the investment in the funds, the distribution of the income, nor the ultimate division of the capital could be effected otherwise than by the interposition of trustees, and it would, I think, be a very short-sighted view of this deed to regard it as a deed of disposition and settlement because it assumed that shape for the purpose of effecting those objects. The substance of the transaction is to be looked for in the purposes which the deed was meant to effect, and not in the forms which were resorted to for effectuating those purposes.

* 415 * What then were the purposes which were meant to be effected by the deed? They were these: That each subscriber to the tontine should be entitled, during the life of his nominee, to a ratable part of the income derived from the investment of the entire fund subscribed to the class to which he belonged, in proportion to the number of the nominees of that class who should from time to time be living, and should be entitled also to a portion or the whole of the capital subscribed to the class to which he belonged if his nominee should be one of the last forty-six surviving nominees or the last surviving nominee of that class. Each subscriber to the tontine must, of course, be considered to have become a party to these purposes, — purposes, it is to be observed, extending to the application of the subscription of each for the benefit of the others in the contingent events specified in the deed, — and as these purposes could not be accomplished otherwise than by contract between the subscribers, it follows of necessity that such a contract must be held to have existed. The case, therefore, looked at with reference to substance, and not to form merely, is in truth this: that each of the subscribers to this tontine on paying his subscription became, by contract with the other subscribers, entitled not merely to the income of his own subscription, subject, of course, to his share of the expenses of management, but to a reversionary interest in the income of the funds derived from the subscriptions of the other subscribers of the same class contingent upon his nominee surviving the nominees of those other subscribers, and further to

a reversionary interest in a portion or the whole of the capital subscribed by the other subscribers of the same class if his nominee should be one of the last forty-six surviving lives or the last surviving life in that class. To simplify the case it may be put thus: Supposing there were only two subscribers in one class, each, on the payment * of his subscription, would be en- * 416 titled by contract with the other to the interest of his own subscription and to a reversionary interest in the income and capital of the other's subscription, contingent upon the death of the other's nominee in the lifetime of his own nominee.

This being the state of the case under the deed, the question we have to decide is, whether succession duty is payable; the immediate facts upon which the question arises being, that in the first class of this tontine with which alone we have to deal, there were originally 364 subscribers, 285 of whom died before the Succession Duty Act came into operation, leaving 79 then surviving, of whom 33 have since died, and the Crown, in consequence of their deaths, claims the duty on $\frac{2}{3}$ ths of the fund.

The general plan of the Act, as I understand it, is this: The 2d section is framed in wide and general terms, to embrace every acquisition of property or income upon the death of any person dying after the time appointed for the commencement of the Act, of whatever description the property may be, and whether the acquisition results from a disposition or comes by a devolution of law; this section providing that every such acquisition of property or income shall be deemed to be a succession, and then proceeding, with a view, as I conceive, to the rate of duty to be chargeable under the 10th section, to define the terms successor and predecessor. But then it was seen that there might be cases which might not fall within the words of the 2d section, or in which, if they fell within the words of that section, there might be questions who was to be deemed the successor and who the predecessor, on which the rate of duty would depend, and sections 3 to 8 inclusive seem to me to have been inserted with a view to meet those cases. Then by * section 10 the duties are imposed in * 417 respect of every such succession as aforesaid; but then by several following sections, 11 to 18 inclusive, the duties thus imposed by section 10 are regulated and modified, and in some instances removed, in the cases referred to in those sections. The rest of the Act seems to me to point more to the different modes

of assessing the duty than to the cases in which it was to be imposed.

This appears to me to be the general plan of the Act, and accordingly, in the argument of this case, the claim on the part of the Crown was rested on the 2nd, 3rd, and 5th sections, with reference also to the 12th and 13th sections, which were called in aid, and on the part of the petitioners the 17th and 18th sections were mainly, if not exclusively, relied on. It was said for the Crown, that by the death of the subscribers to this tontine, who died after the time appointed for the commencement of the Act there was a succession within the meaning of the 2nd section, or there was an accruer of a beneficial interest within the meaning of the 3d section, or there was a benefit accruing by the determination of an estate charge or interest within the meaning of the 5th section, and that the 12th and 13th sections removed any difficulty as to who was to be deemed the predecessor, and who the successor. On the other hand, it was said for the petitioners, that there could in this case be no predecessor, and that the case therefore could not be brought within the 2d section, and that it was not reached by the 3d or the 5th section, the 3d applying only to joint tenants, and the 5th to determinable interests; and it was further insisted that, if the case fell within any of the above sections, the 17th section took it wholly out of the operation of the Act.

* 418 * That this case is one of difficulty cannot, I think be denied. At all events I have felt much difficulty upon it; but, upon the whole, the conclusion at which I have arrived is, that the claim of the Crown for the duty cannot be maintained. How the case would in my opinion have stood if it did not fall within the 17th section of the Act it is not necessary for me to say, and I say no more than that I am not satisfied that the duty would not, in that case, have been payable; but I think that the 17th section applies to and governs this case, and takes it out of the operation of the Act. The section is in these terms: [His Lordship read the section.]

We have here, therefore, a distinct enactment that a contract *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of another person, shall not create the relation of predecessor and successor between the contracting parties, and it being clear that the duty cannot attach unless that relation be created, it follows,

as it seems to me, that no duty can attach in respect of what arises simply and merely from the contract; and that this was what was intended by the legislature is, I think, more plain when it is observed that express provision is made for the duty attaching upon any disposition or devolution of the moneys payable under the contract, thus pointedly marking the distinction between the disposition created by the contract, and the disposition of the moneys payable under the contract. This view of the 17th section is, I think, confirmed by the exception of *bonâ fide* sales contained in the 7th section, and some of the cases referred to in the argument seem to me to favour the same view, distinguishing and treating the cases of sales as not affected by the statute.

It was contended on the part of the * Crown that this * 419 17th section applied only to cases in which the relation of debtor and creditor subsisted, but the words of the section are general as to contracts, and would certainly embrace other contracts than those between debtor and creditor; and I do not think that the circumstance of the provision as to policies of insurance being found in the same section is sufficient to warrant us in limiting the effect of the general words in the manner contended for by the Crown, more especially having regard to the context to which I have already referred.

This present case, therefore, as I view it, resolves itself into the question whether there was here a contract *bonâ fide* for valuable consideration in money for the payment of money on the death of other persons, and for the reasons already given I am of opinion that there was, and I think, therefore, that the claim of the Crown for the duty in respect of what arises under the contract cannot be maintained.

A further point, however, arose in the course of the argument upon a state of facts not appearing upon the petition, but which I understood to be this: Amongst the subscriptions to the first class of this tontine there were three subscriptions by a father in the names of three of his children. Two of the children died before the time appointed for the commencement of the Act; the third child survives and is one of the forty-six surviving lives. It is contended on the part of the Crown that as to the 1000*l.* 3*l.* per cent consols, which is attributable to the subscription for this surviving child, the duty must at all events attach; but it does not appear to me that there is in this case any succession at all, for I

think that in the absence of evidence to the contrary the
 * 420 * subscription must be considered to have been an advancement for the child, and the child, therefore, is only taking what had been given to it long before the commencement of the Act, and takes in its own right, and not by succession from the father.

There must be a declaration, therefore, that no duty is payable in respect of what has become payable under the deed ; but the declaration should, I think, be so worded as not to preclude any claim of the Crown in respect of any disposition or devolution there may have been since the time appointed for the commencement of the Act of what has so become payable under the deed.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

* 421

* WAINE v. CROCKER.

1861. December 17, 18. 1862. January 16. Before the LORDS JUSTICES.

A., tenant in tail in remainder, mortgaged the estate by demise to B. for ninety-nine years if A. should so long live. A. next by deed not enrolled, conveyed to X. and Y., their heirs and assigns, by way of security. Sometime afterwards, in 1849, A., with the consent of the protector, disentailed the estate, and as part of the same transaction and for valuable consideration, the estate was by a separate deed settled (subject to the prior life-estate) to the use of A. for life, remainder to G. W. in fee, G. W. covenanting to pay B.'s mortgage. A. next, suppressing all the above transactions except the security to X. and Y., borrowed money from C., who paid off X. and Y., and the estate was conveyed to him by A., X., and Y. by way of security, the deed being enrolled as a disentailing assurance. G. W. afterwards, without notice of C.'s security, bought A.'s life-estate, and took a transfer of B.'s security to a trustee for himself. C. filed a bill against G. W., alleging that the deed of 1849 had the effect of enlarging the estate of X. and Y. into an absolute fee, which was now vested in C., and that the settlement of 1849, so far as it was for the benefit of G. W., was voluntary and void as against C., and that B.'s security was merged, and C. the first incumbrancer; and by his bill C. offered to redeem if the Court should hold B.'s security still subsisting and prior to his. This bill was dismissed at the hearing, A. being still living. After the death of A., G. W. filed his bill for an injunction to restrain C. from bringing ejectment, on the ground that the order of dismissal had determined the right of G. W. to the estate. *Held*, that such

bill could not be sustained, for that the order of dismissal in the former suit could only have proceeded on the ground that there was no equity to deprive G. W. of the benefit of the term of ninety-nine years determinable on the death of A., which was vested in his trustee, and did not decide who was the rightful owner of the estate.

THIS was an appeal from an order of the Master of the Rolls allowing a demurrer.

The substance of the statements of the bill, which was filed by Giles Waine against William Foord Crocker, was as follows:—

Thomas Waine by his will, dated in October, 1815, devised an estate called the Green estate to a trustee for a term of 500 years upon trusts for raising 500*l.*, with remainder to John Waine for life, with remainder to the first and other sons of John Waine successively in tail. Thomas Waine, the testator, died shortly after the date of his will. John Waine survived him, and Thomas Waine the younger, the first son of John Waine, became tenant in tail in remainder under the limitations of the will. In the year 1817 the then trustees of the 500 * years' term raised * 422 the sum of 500*l.* by a mortgage of the premises comprised in the term to Richard Garlick Bathe for the term of 400 years.

Thomas Waine the younger, the tenant in tail in remainder, attained twenty-one in September, 1827. On the 25th March, 1845, he borrowed the sum of 300*l.* of Isaac Beak, and secured the payment of that sum by a demise to Beak of part of the devised estate for a term of ninety-nine years, if he, Waine, should so long live, and in March, 1846, he borrowed of Isaac Beak a further sum of 200*l.*, and further charged the premises comprised in the ninety-nine years' term with the payment of that sum.

By a deed of the 26th of June, 1849, Thomas Waine the younger, with the consent of John Waine as protector of the settlement made by the will, barred the estate tail, and conveyed the estate, subject to John Waine's life-estate, to uses in bar of dower in his own favour. By a deed of the 30th of June, 1849, he conveyed that part of the estate which was comprised in the deed of March, 1845, to Isaac Beak, in fee by way of mortgage for securing the sum of 600*l.*, and Giles Waine, the plaintiff in this suit, joined with him in that deed and covenanted for the payment of the 600*l.*

By a deed of the 2d of July, 1849, made between Thomas Waine the younger of the first part, John Waine of the second part, the

plaintiff Giles Waine of the third part, and R. Mullings and John Fowler of the fourth part, reciting that, in order to induce John Waine as protector of the settlement to give his consent to barring the entail by the deed of 26th June, it had been agreed that the present settlement should be made, the greater part of the

* 423 estate was conveyed to trustees for the term * of 1000 years, on trust to raise 500*l.* for the younger children of John Waine, with remainder to Thomas Waine the younger for life, with remainder to the plaintiff Giles Waine in fee; and by this deed Giles Waine covenanted to pay Beak the 600*l.* and to indemnify Thomas Waine the younger against the payment of that sum. It appeared also by this deed that, as part of the arrangement, the plaintiff Giles Waine, by an indenture of even date, covenanted with trustees to pay them the sum of 399*l.* for the benefit of some reputed children of Thomas Waine the younger, if he should die in the lifetime of John Waine.

On the 10th of October, 1849, John Waine died. In March, 1850, the trustees of the 1000 years' term raised the sum of 500*l.* secured by that term. They borrowed for this purpose the sum of 530*l.* from Isaac Beak, and they assigned, and Thomas Waine the younger and the plaintiff, Giles Waine confirmed, the term to George Beak by way of mortgage for securing the repayment of that sum to Isaac Beak, and afterwards, in January, 1851, Thomas Waine the younger charged the premises comprised in the deed of the 30th of June, 1849, in favour of Isaac Beak, with this sum of 530*l.*, with the sums of 300*l.* and 200*l.* originally advanced, and a further sum of 100*l.* then advanced, and also with the sum of 600*l.* secured by the deed of the 30th of June, 1849.

In August, 1853, the plaintiff, Giles Waine agreed to purchase Thomas Waine the younger's life-interest in the estate for an annuity of 80*l.*, to be paid to Thomas Waine the younger during his life, and for the sum of 700*l.*, of which 500*l.* was agreed to be applied in payment of the sum secured to R. G. Bathe by the deed of the 9th of June, 1817, and accordingly, by a deed dated

* 424 the 29th of August, 1853, the trustees under the * will of R. G. Bathe, who had then died, and Thomas Waine the younger, conveyed the estate, except two closes which were excepted out of the conveyance, to the plaintiff, Giles Waine, subject to Beak's securities and to the 1730*l.* thereby secured, to the intent that Thomas Waine the younger should receive the annuity of 80*l.*,

and, subject thereto and to a term of ninety-nine years limited to F. W. Fowler for securing the annuity to Thomas Waine the younger, to the use of the plaintiff, Giles Waine, his heirs and assigns. The 700*l.*, the consideration for the purchase of the life-estate, was in fact borrowed by the plaintiff, Giles Waine of Isaac Beak, and by a deed dated the 5th of September, 1853, the plaintiff, Giles Waine charged the estate in favour of Isaac Beak with this sum of 700*l.*, and also with the above-mentioned sums of 600*l.*, 530*l.*, 300*l.*, 200*l.*, and 100*l.*, making in the whole, 2430*l.*

On 27th March, 1855, the plaintiff paid off Isaac Beak's mortgages, and Isaac Beak, by deed of that deed, assigned the mortgaged premises to the plaintiff for the residue of the term of ninety-nine years, if Thomas Waine the younger should so long live, subject to such equity of redemption as was then subsisting therein, upon trust to secure the mortgage debts, and, subject thereto, in trust for the plaintiff. And by the same deed, Beak conveyed the reversion in fee, expectant on the death of Thomas Waine the younger, or other sooner determination of the term of ninety-nine years, to the plaintiff in fee, subject to such equity of redemption as was then subsisting therein, upon trust for securing the mortgage debts, and, subject thereto, upon trust for the plaintiff.

By the same deed George Beak, in whom the term of 1000 years was vested, declared himself a trustee thereof * for * 425 the plaintiff, and Isaac Beak assigned the mortgage debts to Richard Mullings as a trustee for the plaintiff.

In January, 1855, William Foord Crocker filed his bill against Isaac Beak and Giles Waine (the present plaintiff). This bill was afterwards amended, and, as amended, was against Giles Waine, Thomas Waine the younger, Richard Mullings, F. W. Fowler, and George Beak. It stated the deeds set out above, and also stated an indenture dated the 29th of October, 1847, by which Thomas Waine the younger granted an annuity of 25*l.* during his own life to Thomas Bassett, and conveyed the Green estate to John Arnott and Edward Thomas Jones, their heirs and assigns (subject to the life-estate of John Waine under the will, and to the term of 500 years, and to the mortgage made by means of the term), upon trusts for securing the payment of the annuity. Crocker by his bill then alleged that the effect of the disentailing deed of the 26th of June, 1849, was to confirm the voidable estate

created by the last-mentioned deed, and to vest an absolute fee-simple in Arnott and Jones, subject only to John Waine's life estate. The bill further stated, that in October, 1851, Thomas Waine the younger borrowed 700*l.* of Crocker, which was to be in part applied in redeeming Bassett's annuity, and in part paid to Thomas Waine the younger, and on the 29th of that month a deed was executed, and afterwards duly enrolled as a disentailing deed, by which Bassett released the annuity, and Arnott and Jones and Thomas Waine severally conveyed the estate to Crocker in fee by way of mortgage for securing 700*l.* and interest. The bill also stated a further charge to Crocker of 100*l.* by deed of the 27th of November, 1852. That Crocker was not aware at the time of the execution of the deeds of 29th October, 1851, and 27th of No-

vember, 1852; that the entail in the property had been
* 426 already * barred, and that it was not until long after he had taken his said securities that he became aware of Beak's mortgages, and that Thomas Waine had fraudulently suppressed them. The bill further alleged grounds on which Crocker contended that the deed of 2d July, 1849, was, so far as it operated for the benefit of Giles Waine, voluntary. Crocker further alleged that the effect of the deed of the 27th of March, 1855, was to merge Isaac Beak's securities, and to let in Crocker as the first incumbrancer; but in case the court should be of opinion that Beak's securities, or any of them, were still subsisting and entitled to priority over his (Crocker's) securities, then he offered to redeem them. Crocker further submitted, that he had in any case a valid incumbrance on the annuity of 80*l.* reserved to Thomas Waine the younger by the indenture of the 29th of August, 1853, and that he would on the death of Thomas Waine have the legal fee vested in him, and would be entitled to the benefit of it as a purchaser for value without notice. Crocker by his bill prayed, that it might be declared that his securities were the first charge on the property, or, at all events, on the annuity of 80*l.*; that it might be declared that the deed of the 2d July, 1849, so far as regarded the limitation to Giles Waine, was fraudulent and void as against Crocker; that if the Court should be of opinion that any of the securities which formerly belonged to Isaac Beak were subsisting securities, the relative priorities of them, and of Crocker's securities, might be ascertained and declared; and that Crocker might be at liberty to redeem all charges and incumbrances which the Court should

hold to have priority over his, he thereby offering to redeem the same: and the bill went on to pray for the usual foreclosure decree as against a subsequent mortgagee.

* The cause of *Crocker v. Waine*, was heard before the * 427 Master of the Rolls on motion for decree, and on the 8th of April, 1856, his Honor made a decree dismissing the bill without costs, except so far as it sought relief in respect of the annuity of 80*l*. In respect of this annuity, in which Giles Waine claimed no interest, the usual foreclosure decree was made against Thomas Waine, and an order was made by consent upon Giles Waine to pay it to Crocker out of the rents.

Giles Waine's bill, after stating the above facts, proceeded to state that Giles Waine paid the annuity of 80*l*. to Crocker up to the last half-yearly day of payment preceding the death of Thomas Waine the younger, and that Thomas Waine the younger died without issue in January, 1858. It then alleged as follows:—

“The defendant William Foord Crocker, notwithstanding the aforesaid decree and final decision of this Court upon the aforesaid questions at issue in the said suit of *Crocker v. Waine* between him and the plaintiff Giles Waine, has recently brought an action of ejectment against the plaintiff Giles Waine, to recover possession of the hereditaments comprised in the said indenture of the 2d day of July, 1849, and the defendant seeks and intends to raise the same questions at law with reference to the effect of the aforesaid deeds and conveyances as were raised and decided by the aforesaid decree of this honourable Court, and he is in fact prosecuting the plaintiff at law for the same matter as has been already and finally adjudicated upon by this Court, and the plaintiff charges that the defendant ought to be restrained by injunction from proceeding at law against the plaintiff as hereinafter prayed.”

The bill prayed that the defendant might be restrained by injunction from carrying on his action of ejectment * and * 428 from commencing or carrying on any other action or proceeding at law against the plaintiff to recover possession of the premises, or otherwise with reference to any of the matters which were decided or concluded by the decree of the 8th of April, 1856, and that the defendant might be ordered to pay the costs of this suit and the action at law, and for further relief.

The Master of the Rolls having allowed a demurrer to this bill, the plaintiff appealed.

Mr. Baggallay and Mr. Bevir, for the appellant. — It must be assumed that when the Court decided *Crocker v. Waine*, it dealt with every view of *Crocker's Case*. He made by that bill a case of the voidable estate created by the deed of October, 1847, being confirmed by the disentailing assurance of the 26th of June, 1849, and the Court must be held to have decided that it was not so confirmed. At the time when Crocker's bill was filed the case could not be tried at law, because the determinable term of ninety-nine years was still subsisting; that term being now gone, Crocker is endeavouring to try at law a case which has already been decided against him in equity. Suppose Crocker should succeed at law, what remedy would Giles Waine have? Is he to file a bill to redeem when this Court has already decided that as against him Crocker has no mortgage? An injunction, therefore, ought to be granted. *Vernon v. Acherley*, (a) *Duke of Buckingham v. Duchess of Buckingham*, (b) *Booth v. Leycester*, (c) *M'Namara v. Arthur*, (d) *Prothero v. Phelps*. (e)

* 429 * *Mr. Selwyn and Mr. Hardy*, for the respondent, in support of the demurrer. — The cases cited were all cases where the Court had assumed jurisdiction to try the whole of the questions between the parties. Here the Court decided nothing in *Crocker v. Waine*, except that there were two purchasers for value without notice, between whom it would not interfere. Giles Waine had no redeemable interest, unless it was held that his purchase was void on equitable grounds; the Court decided that there was no equity to impeach it. This being so, the bill failed, and was necessarily dismissed, except in respect of the annuity, and this dismissal was no decision as to the rights at law. If the dismissal was a decision on the rights, it ought to have been pleaded at law. The question which has now to be tried at law, namely, whether the disentailing deed confirmed the prior voidable conveyance, was not argued in *Crocker v. Waine*. The present bill is

(a) 2 Eq. Ca. Ab. 527.

(d) 2 Bal. & B. 349.

(b) 2 Eq. Ca. Ab. 526.

(e) 7 De G., M. & G. 722.

(c) 1 Keen, 579.

wholly misconceived ; it is an attempt to restrain by injunction a purchaser for value without notice from asserting his legal rights.

Mr. Baggallay, in reply.

Judgment reserved.

1862. January 16.

THE LORD JUSTICE TURNER. — This is an appeal from an order of the Master of the Rolls allowing a demurrer to the bill. The bill is filed by Giles Waine against W. F. Crocker. The case stated by it, stripped of the complication introduced into it by the number of deeds which have been executed in the course of the transactions in question, and which are set forth at some length, is simply this, that the defendant * W. F. Crocker * 430 is proceeding at law by ejectment to recover possession of an estate to which the plaintiff Giles Waine claims to be entitled, and is so proceeding upon a title which this Court in a former suit of *Crocker v. Waine*, instituted by the defendant W. F. Crocker against the plaintiff Giles Waine, decided that the defendant Crocker had no right to set up against the plaintiff Giles Waine, so that, to use the language of the bill, the defendant Crocker is in fact prosecuting the plaintiff Waine at law for the same matter as has been already and finally adjudicated upon by this Court, and the bill prays for an injunction to restrain the defendant Crocker from thus proceeding at law and for general relief only.

The decree in the suit instituted by Crocker, which is of course set forth in this bill, was to dismiss that suit, except in respect of an annuity, as to which there is now no question. The bill, therefore, rests upon this equity, — that this Court, in the suit which was instituted by the defendant Crocker, determined that he was not entitled to set up against the plaintiff Giles Waine the title which he is now asserting at law. It is not, I think, necessary to consider the question whether this would be a sufficient equity to maintain the bill. I assume, for the present purpose, that it would, and the question then must be, whether there was any such decision in Crocker's suit as alleged by this bill. This is a question which, as I apprehend, must be tried by the record, and the record only ; and I lay out of consideration, therefore, what has been stated to have been said by the Master of the Rolls as to the

ground on which his decree in Crocker's suit proceeded, except to this extent, that it is useful and valuable as pointing out the ground on which the decision in that case may have proceeded. In * 431 that * respect his Honor's observations are, I think, entitled to great weight.

The case in Crocker's suit, as I understand it, stood thus: Crocker claimed to be a mortgagee under a deed of the 29th of October, 1851, and he insisted that he had under that deed the fee of the estate in question, by reason of a defeasible fee in that estate, which, as he alleged, had been conveyed to Arnott and Jones by a deed of the 29th of October, 1847, having, as he insisted, been converted into an absolute fee by a disentailing assurance of the 26th of June, 1849, and having been conveyed to him by Arnott and Jones. The plaintiff Giles Waine, on the other hand, contended that he was a purchaser of the fee of the estate under the disentailing assurance without notice of Crocker's claims, and he insisted, amongst other things, on a legal estate for the term of ninety-nine years, if Thomas Waine the younger should so long live, created by a deed of the 25th of March, 1845, and then vested in him. There was no equity alleged by the bill in Crocker's suit against the plaintiff Giles Waine upon the ground of his having at any time had notice of Crocker's mortgage; and it seems to me, therefore, that it was almost of course to dismiss the bill in that suit, so far as it was dismissed, there being a legal estate vested in Giles Waine, and no equity alleged against him. It is said, however, that it was equally of course to dismiss the bill if the Court was of opinion that the defeasible fee was not enlarged into an absolute fee, and that the Court might, and indeed the argument was carried so far as to say that it must, have proceeded upon that ground; but I am satisfied that the Court did not proceed, and I think, indeed, that it could not have proceeded, upon that ground. If there was no equity against the legal estate in the now plaintiff Giles Waine, the Court had, * 432 as I conceive, * nothing more to do with the matter; and what seems to me to be decisive as to the ground on which the Court proceeded is this: that Thomas Waine the younger was then living, and that Crocker, therefore, whether the defeasible fee was or was not enlarged into an absolute fee, had a subsisting estate and interest in him with which the Court must of necessity have dealt, if it had proceeded upon any other ground than that

there was no equity against the legal estate vested in the plaintiff Giles Waine, for Crocker by his bill offered to redeem, and there is no ground, so far as I can see, upon which the Court could have refused him that relief, except that his equity to redeem was shut out by the legal interest vested in the plaintiff Giles Waine. It seems to me, therefore, that the decree in Crocker's suit must be taken to have proceeded wholly upon the ground that Crocker had no equity against the plaintiff Giles Waine, and that it did not at all affect the question, whether Crocker had or would have any legal right against him; and this bill being merely to restrain the exercise of an alleged legal right, I think that there is no foundation for it, and that the demurrer was properly allowed. It was suggested in the course of the argument, that the point raised by the demurrer might be reserved to the hearing, and that the Court might at the hearing put Crocker upon terms as to the exercise of the rights asserted by him; but this bill alleges no notice in Crocker, and I cannot see, therefore, what equity there could be which could alter the case against him at the hearing. The bill is not framed for redemption, and the case alleged by it is so wide of any claim to that relief, that it could not, I think, be granted under the prayer for general relief. I am of opinion, therefore, that this appeal must be dismissed, and, I think, with costs.

* THE LORD JUSTICE KNIGHT BRUCE. — I agree that it was * 433 right in the Master of the Rolls to allow the demurrer, but I should have been disposed to give liberty to amend, or rather to reamend, the bill, and I think that it would be right now to give liberty to do so; but the Lord Justice not being of that opinion, such liberty cannot be given. It being stated that the Master of the Rolls was not asked to give leave to amend, I agree with the Lord Justice as to the costs of the appeal.

GRESLEY v. MOUSLEY.

1861. November 15. 1862. January 17. Before the LORDS JUSTICES.

A purchase by a solicitor from a client having been set aside on the ground that the sufficiency of the consideration was not established, an inquiry was directed with a view to ascertain whether the purchase-money was paid. No evidence was adduced on the inquiry to prove the payment, except the acknowledgment in the body of the deed and the usual indorsed receipt. It appeared that no further evidence could be had, and that there was no reason to suppose that any evidence had been destroyed. *Held*, that the acknowledgment and receipt were not sufficient evidence as against parties claiming under the client, and that the purchase-money must be considered not to have been paid.¹

The client devised all his real estates in such manner that the plaintiff was entitled in tail in remainder expectant on a life-estate. The plaintiff by his bill, which impeached the purchase by the solicitor, offered to confirm certain sales of minerals which had been made by the solicitor after the death of the client. *Held*, that the plaintiff, having adopted the sales of the minerals, could not claim to be entitled *in presenti* to the moneys arising from them on the ground that the working mines was an act of waste, but was entitled to them only after the death of the tenant for life.

THIS was an appeal from an order made by Vice-Chancellor STUART upon the hearing of the cause for further consideration. The facts of the case are fully stated in the report of the hearing upon the appeal from the original decree, (a) and need not be restated in detail, but it may be convenient to give a short summary of them.

Sir Roger Gresley was seised in fee of some lands and
 * 434 * mines, including the mines under some lands the surface of which had been alienated by him. William Eaton Mousley was his solicitor and confidential adviser. By indentures of lease and release, dated the 17th and 18th of February, 1837, Sir Roger Gresley conveyed the above-mentioned lands and mines to William Eaton Mousley. The conveyance purported to be made in consideration of 6940*l.* expressed to be paid by William Eaton Mousley to Sir Roger Gresley, and there was upon the conveyance

(a) 4 De G. & J. 78.

¹ See *Gresley v. Mousley*, 4 De G. & J. 78, 99 and cases in note (1); *Morgan v. Evans*, 3 Cl. & Fin. 205; *Lawless v. Mansfield*, 1 Dr. & War. 557; *Kerr F. & M.* (1st Am. ed.) 166, 307.

the usual receipt for the purchase-money. On the 21st of February, 1837, there was a mortgage by Sir Roger Gresley to William Eaton Mousley of other property for 772*l*. Sir Roger Gresley afterwards, by his will, dated in May, 1837, devised all his real estates to his wife, now Lady Sophia Des Vœux, for life, with remainder to his children in tail, with remainder to Nigel, afterwards Sir Nigel Gresley, for life, with remainder to the first and other sons of Sir Nigel in tail. Sir Roger Gresley died in October, 1837, without issue. Lady Sophia Des Vœux was still living. Sir Nigel died in 1847, and the plaintiff, who was his eldest son, attained twenty-one in 1852, and filed the bill in this suit in 1855, to set aside the sale by Sir Roger Gresley to William Eaton Mousley. Upon the hearing of the cause, Vice-Chancellor STUART set aside the sale altogether, not only as against the plaintiff, but also as against Lady Sophia Des Vœux; but he was of opinion that the 6940*l*. must be considered to have been paid, and he refused to direct any inquiry upon that head.

By the order made by the Lords Justices upon the hearing of the appeal from this decree, it was declared that the sale made by Sir Roger Gresley to William Eaton Mousley of the estates comprised in the deeds of the 17th and 18th of February, 1837, and those deeds, was and were void in equity as against the plaintiff, and *it was declared that, notwithstanding the *435 sale and the indentures, the plaintiff, upon the death of Sir Roger Gresley, became entitled in equity under his will, as against William Eaton Mousley, to the estates, as tenant in tail in remainder expectant on the decease of Lady Sophia Des Vœux; and, except as to the parts thereof which had been sold since the date of the execution of the indentures (the plaintiff by his bill having offered to adopt such sales), the plaintiff is now so entitled, "subject, however, to the payment in such manner as the Court shall direct of what, if any thing, the defendants shall, upon the result of the accounts and inquiries hereafter directed, appear to be justly entitled to as against the said plaintiff, and subject also to such leases as may, since the date and execution of the indentures, have been made of the unsold parts of the estates, the plaintiff undertaking not to disturb such leases in so far as the same may not be binding upon him." And then an inquiry was directed "whether the sum of 6940*l*. in the indenture of the 18th of February, 1837, mentioned, or any and what part thereof, was ever

and when, in any and what manner, paid or satisfied by William Eaton Mousley to Sir Roger Gresley, or was at the time of the date and execution of the indenture due and owing from Sir Roger Gresley to William Eaton Mousley over and above and in addition to the sum of 7724*l.* secured by the mortgage of the 21st of February, 1837, in the pleadings mentioned." Then there was an inquiry as to the sale of the minerals, and an account directed "of all sums of money received by William Eaton Mousley in his lifetime for or in respect of any such sale or sales, lease or leases, or otherwise for or in respect of any rents or profits of the estates or any part thereof, not being the annual profits of land or the profits of mines opened in the lifetime of Sir Roger Gresley, or the profits

or produce of any of the estates included in any such sale * 436 or sales as aforesaid, accrued * or obtained subsequently to such sale or sales;" and then an inquiry "what mines comprised in or under the estates comprised in the indenture of the 18th of February, 1837, were opened or in work during the life of Sir Roger Gresley, and what, if any, mines have been opened since the decease of Sir Roger Gresley, and under what circumstances;" and the costs were reserved, and the further consideration was adjourned, and it was expressly provided that the order should be without prejudice to any question as to the rights of the parties in respect "of what, upon the taking of the account, shall appear to have been received otherwise than in respect of any sale or sales, and as to interest, and without prejudice also to any question between the defendants or any of them in respect of the life-interest of the defendant Lady Sophia Des Vœux."

In pursuance of this decree the chief clerk certified, first, as to the purchase-money, thus: "Except as appears by the receipt for the sum of 6940*l.*, indorsed on the indenture of the 18th of February, 1837, and signed by Sir Roger Gresley, no evidence has been produced to show whether the said sum of 6940*l.*, or any part thereof, was ever in any manner paid or satisfied by William Eaton Mousley to Sir Roger Gresley, or was, at the time of the date and execution of the indenture, due and owing from Sir Roger Gresley to William Eaton Mousley over and above and in addition to the sum of 7724*l.* secured by the mortgage of the 21st of February, 1837:" so that it was expressed that no evidence was adduced before the chief clerk beyond the deed itself and the receipt indorsed on the deed, signed by Sir Roger Gresley, of the

payment of the 6940*l.*, or of any sum having been due from Sir Roger Gresley to William Eaton Mousley beyond the 7724*l.* which was secured by the mortgage-deed. Then the chief clerk found, as * to the proceeds of the sales, to the effect that * 437 the moneys produced by the sales by William Eaton Mousley in his lifetime, or by the defendants his representatives since his death, of parts of the estates comprised in the indenture of the 18th of February, 1837, amounted altogether to the sum of 9593*l.* 10*s.*, "of which the sum of 6343*l.* 10*s.* for principal moneys had been received by William Eaton Mousley in his lifetime, or by the defendants his representatives since his death, and the sum of 3250*l.*, with interest at the rate of 4*l.* per cent per annum, remained still unpaid and due from the trustees of the purchaser, Court Granville." Then as to the mines the chief clerk found: "That, except the mine of clay on Gresley Common, no mine or mines comprised in or under the said manor and lands was or were opened or in work in the lifetime of Sir Roger Gresley."

This certificate was approved by his Honor, and on the hearing of the cause for further consideration his Honor made an order to the following effect: He declared that the defendants, the representatives of William Eaton Mousley, were entitled to credit for the purchase-money or sum of 6940*l.* on account as thereafter mentioned. Then the decree proceeded to set off the 6343*l.* (the amount of purchase-moneys received in respect of the mines) and the costs of the suit against 6940*l.*, the amount of the purchase-money, and if the 6343*l.* and the costs exceeded the amount of 6940*l.*, then William Eaton Mousley's representatives were to convey the reversion in fee to the plaintiff, the devisee under the will of Sir Roger Gresley, and there was to be a proof against Mousley's estate for the excess. If, on the other hand, the 6343*l.* and the costs fell short of the 6940*l.*, then the conveyance was to be made on payment of the difference by the plaintiff. Then it was directed that * the 3250*l.*, the purchase-money * 438 remaining unpaid, should be assigned by the representatives of William Eaton Mousley to the plaintiff, and an injunction was granted to restrain the representatives of William Eaton Mousley from receiving that 3250*l.*

The plaintiff appealed from so much of this order as proceeded on the footing that the 6940*l.* had been paid by Mousley to Sir R. Gresley.

Mr. Malins and *Mr. G. Lake Russell*, for the plaintiff, in support of the appeal. — There is no evidence of the money having been paid, except the deed, and the receipt indorsed on it. The deed having been set aside, the receipt must fall with it. The inquiry directed by the order on appeal shows that it was intended that the defendants should bear the *onus* of proving that the money was paid. It would be contrary to the principles of the Court to let a receipt indorsed by a client on a deed, for money expressed to be received by him from his solicitor, prevail against him without corroborative evidence. *Lewes v. Morgan* (a) is decisive upon this, and the rule is especially applicable in a case like the present, where, as there were large dealings between the solicitor and client, it is *a priori* very likely that no money would pass. It is a suspicious circumstance that no trace whatever can be found in any of the solicitor's books of his having paid any money to Sir Roger Gresley at that time; if he did so, it was his duty as well as his interest to preserve evidence of it. Neither is any trace of the money to be found in Sir Roger Gresley's banking account. Then the plaintiff ought to have interest on so much of the 6343*l.* 10*s.* as arose from the purchase-money of the

* 439 * mines sold by Mousley, for they were wrongfully opened, and therefore the coals raised belonged to him as entitled to the first estate of inheritance, the tenants for life being impeachable for waste. Thus the plaintiff's money having been received by Mousley, which ought to have been paid to the plaintiff at once, the plaintiff ought to have interest upon it.

Mr. Amphlett and *Mr. Charles Hall*, for Mousley's executors. — The Court did not set aside the sale in this case on the ground of fraud, and it is quite consistent with every thing proved, and with every thing decided, in the case, that the transaction was a perfectly honest one. The sale was set aside because Mousley's representatives could not adduce sufficient evidence to show that full value had been given, or that Mousley had given Sir Roger Gresley such advice as to put him at arm's length, so that their dealing might be unaffected by the relation of solicitor and client. Fraud, then, being neither alleged nor proved, on what ground is it to be said that a receipt indorsed on the deed and signed by Sir Roger Gresley is to go for

(a) 4 Dow, 29; 5 Price, 42; 3 You. & Jerv. 230.

nothing. The declarations of the decree do not touch the case: there is no connection between the setting aside a purchase-deed, because adequacy of price is not proved, and the question whether that price was paid. There is no allegation that Sir Roger Gresley's signature to the receipt was obtained by fraud, or that he did not perfectly understand the nature of the document he was signing. The question rests on the receipt alone, neither party being able to adduce a shred of further evidence; and, in the absence of opposing evidence, credit must be given to a receipt, even as between solicitor and client. The case ought to be dealt with on the same principle as a stated and settled account; fraud * not being proved, the account is not opened, but * 440 liberty is given to surcharge and falsify, in which case the *onus* lies on the party alleging errors in the account. *Horlock v. Smith*, (a) *Waters v. Taylor*, (b) *Wharton v. May*, (c) *Piddock v. Brown*. (d) The observations of Lord ST. LEONARDS, in Sugden's Law of Property, (e) on the case of *Lewes v. Morgan*, are to be borne in mind in applying that case. The Court is here discharging the duty of a jury, and a jury certainly would, on the strength of the receipt, find as a fact that the money was paid. Then as regards the question of interest on the money received by Mousley for the mines, the plaintiff must proceed on the footing either that he affirms the sale of them by Mousley or disaffirms it. If he affirms it, the interest belongs to the tenant for life, though impeachable for waste, as in the case of timber cut down by order of the Court, or by agreement between tenant for life impeachable for waste and the remainder-man, and the plaintiff's claim for interest fails. If he elects to disaffirm it, he treats the getting of the coals as a wrongful act, and we contend that he must be left to his remedy at law. It is, however, unnecessary to press that, for the plaintiff has come here offering to confirm the sale of the mines, and cannot claim to treat it as void for a particular purpose.

Mr. Osborne appeared for Lady Sophia Des Vœux, and *Mr. Bacon* for the trustees of Sir Roger Gresley's will.

(a) 2 Myl. & Cr. 495.

(d) 3 P. Wms. 288.

(b) 2 Myl. & Cr. 526.

(e) Page 576.

(c) 5 Ves. 27.

Mr. Malins, in reply.—The Court has decided that it was incumbent on Mousley to preserve evidence of his having
 * 441 given a fair * value; and surely it was not less his duty to preserve evidence of his having paid the purchase-money. The receipt, though not technically a part of the deed, is practically so, and credit cannot be given to it after setting aside the deed. As to the interest on the moneys arising from mines, it cannot lie in the mouth of a wrong-doer to say, that if we recover interest we shall be getting a benefit which we should not have had but for his act, and that therefore, he ought not to be called upon to pay it. The mines are much more valuable now than they were when sold, and the interest will be but a poor compensation for our loss. There is no analogy between this case and that of the opening of mines or cutting timber by arrangement between tenant for life impeachable for waste and remainder-man, for there the plaintiff was an infant incapable of assenting.

Judgment reserved.

1862. January 17.

The Lord Justice TURNER, after stating the facts in nearly the same terms as above, proceeded as follows :—

Two questions were raised upon the argument of this appeal. First, whether the 6940*l.* ought, as declared by the order, to be considered to have been paid by William Eaton Mousley to Sir Roger Gresley, and whether the executors and trustees of William Eaton Mousley ought to have credit in account for that sum, as directed by the order; and, secondly, whether, assuming that we dissent from the above declaration and direction, the plaintiff is entitled to interest upon the whole or any part of the 6343*l.* 10*s.* which, on that footing, will be due from the estate of William Eaton Mousley.

As to the first of these questions, it was much insisted
 * 442 upon on the part of the appellant, in the course of the * argument before us, that the order which we made upon the hearing of the former appeal threw upon the defendants, the representatives of the estate of William Eaton Mousley, the *onus* of adducing further evidence to prove the payment of the 6940*l.*,

and was of itself decisive that, in the absence of such further evidence, the payment of that sum could not be held to have been established; but the order on which the appellant thus relied was, as it seems to me, consistent with further evidence being adduced, either to negative or support the payment; and the further evidence, if there had been any, might have removed all doubt upon the point. I am not, therefore, prepared to hold that this question was not open for argument on the present appeal. I should, indeed, be unwilling to decide this case upon so narrow a ground, more especially as we could not, I think, do so without disregarding principles which are well established in this Court, and without, to some extent at least, contravening the opinions of Judges, whose opinions, if they do not absolutely bind us, I should at all events consider it presumptuous in me to question. The obligations resting upon an attorney dealing with his client were much considered in the case of *Lewes v. Morgan*. Lord REDESDALE in that case expresses himself thus: "This is the case of an attorney, who acted as general agent and legal adviser of his principal and client, obtaining his bond. He is, therefore, bound by a very strict rule of law to prove, by other evidence, the actual advance of the whole consideration. That principle was recognized in the case of *Vaughan v. Lloyd*." Lord ELDON's parting observation in the same case of *Lewes v. Morgan* was this: "I am desirous of stating that the proceedings on this record establish the principle, that, in the case of an attorney who takes securities from his client they cannot be used as conclusive evidence of their consideration * as expressed, but require extrinsic evidence of the * 443 money having been actually advanced, to prove the transaction to have been *bonâ fide*." These passages are to be found in Price; (a) and Sir WILLIAM ALEXANDER, when afterwards dealing with the case of *Lewes v. Morgan* in an ulterior stage, after referring to another part of Lord ELDON's judgment in that case, makes this observation: "The opinion thus attributed to Lord ELDON has been viewed as supporting Morgan's (the attorney) case on the present occasion, because it was said he might have justice by the general report, and so he might, but then he must first comply with the previous conditions. He must prove the actual advance by some other medium than the instruments themselves." (b)

(a) Vol. 5, pp. 142, 143.

(b) 3 You. & Jer. 252.

We have here, therefore, the opinions of three Judges, as to two of whom I may say, without disparagement to the third, that their knowledge and experience has never been surpassed, or perhaps equalled, that, in the case of an attorney taking a security from his client, it is incumbent upon him to prove the advance of the money by some other evidence than the instrument creating the security; and I can see no distinction between the case of a security and the case of a purchase. The principle which governs the one case must, as it seems to me, govern the other, and I take that principle to be the same principle which runs through all the cases on dealings between attorney and client, — that the attorney dealing with his client is bound to give the client, at least, the same protection as he would be bound to give him if dealing with a stranger.¹ It would be the duty of the attorney to see that the client, if dealing with a stranger, did not commit himself to any thing which would be to his prejudice.² If the client

was dealing with the stranger for an advance of money
 * 444 * upon security, or for the sale of an estate, it would be the attorney's duty to see that the client did not acknowledge the advance, or give a receipt for the purchase-money, unless it was actually paid.³ If he failed to advise the client acting in the transaction under his advice not to give the acknowledgment or sign the receipt unless the money was actually paid, he could not surely be permitted to set up, in justification of his own negligence, that the client had done so without his advice; and if he could not do this in the case of a client dealing with a stranger, how can he be permitted to do so in the case of the client dealing with himself? The necessity of independent proof of payment in the case of dealings between attorney and client seems to me to follow from these considerations. The obligation which rests upon the attorney to protect the client, when dealing with him in matters of security or purchase, would indeed be of no value whatever unless some independent proof of payment was required; nor is it any hardship upon the attorney to require such proof, for it is no less his duty than his interest to keep correct accounts and preserve the evidence

¹ See Kerr F. & M. (1st Am. ed.) 164, 165; Holman v. Loynes, 4 De G., M. & G. 270, and note (1); Carter v. Palmer, 8 Cl. & Fin. 657.

² See Montmorency v. Devereux, 7 Cl. & Fin. 188; Donaldson v. Haldane, 7 Cl. & Fin. 762; 1 Dart V. & P. (4th Eng. ed.) 32, 33, 34.

³ See 1 Sugden V. & P. (8th Am. ed.) 285.

of his dealings with his clients. It was urged, on the part of the defendants, that in *Lewes v. Morgan*, and the cases there referred to, there were circumstances of suspicion, and it was attempted to be shown that the decisions were founded on those circumstances; but it is clear, to my mind at least, that whatever may have been the grounds on which the previous cases proceeded, it was intended, both by Lord ELDON and by Lord REDESDALE, in *Lewes v. Morgan*, to lay down a general principle, and I am by no means inclined to fritter away that principle, as I believe it to be just and sound. The lapse of time, too, was much insisted upon on the part of the defendants; but, for the reasons which were given on the former appeal, I think the argument on that point *, entitled * 445 to but little weight. It is scarcely possible that time can in this case have destroyed the evidence of payment, if such evidence had existed. It was also said for the defendants, that a jury would certainly have found that this purchase-money was paid; but it is by the principles of this Court, and not by what the opinion of a jury might have been, that this case must be decided. In my opinion, therefore, the declaration contained in this order as to the payment of the purchase-money, and the directions consequent upon that declaration, cannot be supported.

It is necessary, therefore, to consider the second question, the plaintiff's claim to interest on the 6343*l.* 10*s.* This is composed in part of the purchase-moneys of lands, and in part of the purchase-moneys of mines which were sold by W. E. Mousley after the purchase by him, and the mines which were so sold were unopened at the time of the death of Sir R. Gresley. The plaintiff's interest in the estate being in reversion expectant upon the death of Lady Sophia Des Vœux, he cannot, of course, have any claim to interest on so much of this sum as was derived from the purchase-money of land; but it was contended on his part that he is entitled to interest on so much of the sum as arose from the purchase-money of the unopened mines. This claim was rested upon the ground (and I see no other ground on which it could be rested) that as against the plaintiff these mines were wrongfully opened, and that the coals which were raised, immediately upon their being severed from the land, vested in the plaintiff as the owner of the first estate of inheritance. The plaintiff's right to the coals ought, it was said, to be followed into the purchase-money, and the plaintiff consequently to be allowed interest upon

it; but whatever might have been the plaintiff's rights or
 * 446 remedies at law, or in this Court, * if he had repudiated the sales of these mines, and I give no opinion as to what those rights or remedies might have been, the plaintiff has come into this Court offering to adopt, and has adopted, the sales of these mines. He could not otherwise be entitled to the moneys produced by those sales, and he cannot, I think, be permitted to say that the sales were rightful, so as to entitle him to the purchase-moneys, but that the mines were wrongfully opened, so as to entitle him to the interest which he claims. I think, therefore, that the claim for interest cannot be maintained.

The result appears to me to be, that the order under appeal must be varied. That the declaration and the directions for set-off must be struck out, and in lieu of them there must be a direction for proof against the estate of W. E. Mousley of the 6843*l.* 10*s.*, and of the costs up to and including the Vice-Chancellor's order; but I think that there should be no costs of the appeal, the appellant failing as to the interest which he has claimed.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

* 447

*KERNOT *v.* POTTER.POTTER *v.* KERNOT.

1862. January 15, 16, 18, 20, 31. Before the LORDS JUSTICES.

An agreement was entered into between K. and P. that K. should take out a patent for purifying paraffine and assign it to P.; that P. thereupon would work it for fourteen years, if it could be so long worked at a profit; would not purify paraffine by any other process, and would pay to K. a royalty upon all purified paraffine sold; that P. would keep accurate account of all paraffine purified according to the patent, render them half-yearly and verify them, and that the provisions of this agreement, and all other provisions usual and proper in such deeds, should be incorporated in the deed of assignment of the patent, such deed to be prepared by counsel to be agreed on by the solicitors of the parties. The patent was taken out, and P. commenced working under it, but shortly afterwards abandoned the use of the process, alleging that it could not be worked at a profit, and refused to pay any royalty. K. thereupon brought an action at law for royalties and recovered judgment.

Pending this action, P. gave notice to determine the agreement, because the invention could not be worked to a profit. K., after obtaining judgment, filed his bill, asking for an account of subsequent royalties, an injunction to restrain the defendant from purifying paraffine under any other process, and for a reference to chambers to settle a proper deed of assignment, or if the Court should hold the agreement to have been determined, then for relief against the defendant as an infringer of the patent. *Held*, by the Lord Justice TURNER, that in a case of this nature it was in the discretion of the Court whether it would direct an account or leave the parties to their remedy at law, and that in the present case, the account being only a part of an agreement which the Court could not wholly enforce, the plaintiff ought to be left to his remedy at law, and that for the same reason the execution of the assignment ought not to be decreed.¹

THESE were appeals from the decrees of the Master of the Rolls, by which he dismissed the bills in both suits with costs. The first of the suits, *Kernot v. Potter*, was instituted by the plaintiff, Dr. Kernot, for the purpose of obtaining relief under an agreement entered into by him with the defendant Potter, or, in the alternative, of enforcing rights which he claimed under a patent which formed the subject of that agreement. The other suit, *Potter v. Kernot*, was a cross suit, instituted by Potter against Kernot, for the purpose of setting aside the agreement on which Dr. Kernot's suit was founded.

The bill in the original suit alleged, that previous to the month of January, 1859, the plaintiff, Dr. Kernot, had discovered a new process for purifying and decolourizing * paraffine, * 448 and had communicated it to the defendant Potter, and that on the 10th of January, 1859, an agreement was entered into between the plaintiff Dr. Kernot and the defendant Potter, by which, after reciting that Dr. Kernot had invented a process whereby ordinary crude paraffine could be purified in a much more cheap and effective manner than had been possible under any process theretofore in use, and that Potter was desirous that Dr. Kernot should take out letters-patent for the same, which Dr. Kernot had agreed to do upon the terms thereafter appearing, it was agreed by and between the parties thereto —

¹ See *Moxen v. Bright*, L. R. 4 Ch. Ap. 292; *Watford &c. Railway Co. v. London &c. Railway Co.*, L. R. 8 Eq. 231; *Kerr Inj.* 492, 493, 529; *Gervais v. Edwards*, 2 Dr. & War. 80; *Ogden v. Fossick*, 32 L. J. Ch. 73; *Fry Specif. Perfor.* (2d Am. ed.) 334, § 543 *et seq.*; *Smith v. Leveaux*, 2 De G., J. & S. 1; *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18.

1. That Dr. Kernot would forthwith take out a patent for the invention, upon being supplied by Potter with the money necessary for such purpose, the expense of such patent, and also of the deed of assignment thereafter mentioned, to be ultimately borne by the parties in equal proportions, the proportion of Dr. Kernot to be retained by Potter out of the first moneys coming to Dr. Kernot under the provisions of the agreement.

2. That Dr. Kernot would, immediately upon the said letters-patent being granted, assign them to Potter, his executors and administrators, upon the terms thereafter appearing, and also, at the request of Potter, assign to him any further letters-patent or any improvement in the purification which Dr. Kernot might at any time take out.

3. That Dr. Kernot would, at the like request, from time to time afford to Potter any practical assistance or instruction in his power relative to the working of the said patent or other inventions, Potter paying him any expenses to which he might be put, and a fair and reasonable remuneration for his trouble and loss of time in so doing.

* 449 * 4. That, upon the process being provisionally protected, Potter would forthwith commence working, and afterwards effectively work, the patent during a term of fourteen years from the date of the agreement, in case he should so long live, and in case the patent could be so longed worked at a profit; and there was given a power to his personal representatives to continue the working, if they should think fit.

5. That Potter would not, during the continuance of this agreement, sell any crude paraffine, or any other paraffine purified or prepared according to any process other than that of Dr. Kernot, and would sell the purified paraffine at the best price that could be obtained for the same, and pay to Dr. Kernot a royalty of one-third of the difference between the market price of crude paraffine and the price which he should from time to time receive for the sale of the paraffine to be refined by him according to the said process, such royalty to be payable monthly.

6. That Potter would, during the continuance of this agreement, keep accurate accounts of all paraffine to be purified by him in accordance with the said process and of the price for which the same should from time to time have been sold, and render such accounts half-yearly, and verify them by the production of such

books as should be in his sole custody, the first of such half-yearly accounts to be rendered at the expiration of six months from the date of this agreement.

7. That if Potter should die during the continuance of the agreement, and his personal representatives should not elect to continue working the patent, or in case Potter, his executors or administrators, should at any time thereafter neglect to work the patent, or should work it in an improper or ineffectual manner, Dr. Kernot should be entitled to call upon Potter, his executors, administrators, * and assigns, to re-assign the said * 450 patent to him, and this agreement should cease and determine in all respects, but until so determined should remain in full force and effect.

8. That no license to work the patent nor any assignment thereof should be granted or executed without the consent of both parties, and that the profits of every license or assignment should be equally divided between the parties.

9. That disputes between the parties should be referred to arbitration in manner provided by the agreement.

10. That in case anybody should infringe the patent, Potter would take all necessary and proper proceedings to protect the same, and to recover damages for such infringement, the expense of such proceedings to be borne equally between the parties.

11. That this agreement should supersede all former agreements between the parties.

12. That the provisions of this agreement, and all other provisions usual and proper in deeds of a like nature, should be incorporated in the deed of assignment of the patent, such assignment to be prepared by counsel to be agreed on between the solicitors to the parties, and to be paid for in the manner therein before mentioned.

The original bill further stated that Dr. Kernot accordingly took out the patent, which was dated as of the following day, and in due time filed the specification; that he instructed the defendant Potter in the mode of purifying under the patent, and that in June, 1859, the defendant commenced working, and had ever since worked according to the invention at a great profit; that * the defendant Potter, not having accounted accord- * 451 ing to the agreement, the plaintiff Dr. Kernot, in March,

1860, brought an action against him in the Court of Exchequer for the payment of royalty up to the 28th of January, 1860, to which the defendant Potter pleaded, amongst other things, "that he the defendant was induced to enter into the said agreement by the false and fraudulent representation of the plaintiff that the said invention was new, and that the plaintiff was the first and true inventor thereof,—whereas in truth and in fact the said invention was not new and the plaintiff was not the first inventor thereof, as the plaintiff at the time of the making the said representation and agreement well knew, but the defendant did not know:" that issue was taken on the pleas, and that the plaintiff recovered and obtained judgment in the action: that whilst the action was pending the defendant Potter had served the plaintiff with the following notice: "Whereas by an agreement dated the 10th day of January, 1859, made between the undersigned William Potter and you the said Charles Middleton Kernot, after reciting that you had invented a process whereby ordinary crude paraffine could be purified in a much more cheap and effective manner than had been possible under any process theretofore in use, and that the said William Potter was desirous that you should take out letters for the same, which you had agreed to do as therein mentioned, it was agreed by and between us that you should take out a patent for the said invention upon being supplied by me with the money necessary for such purpose, and that you should, upon the said letters-patent being granted, assign the same to me as therein mentioned, and I agreed, upon the said process being provisionally protected, and in consideration of the said agreement, forthwith to commence working and afterwards effectually to work the said patent during the term therein

* 452 mentioned of fourteen * years from the date of the said agreement, in case I should so long live and in case the said patent should so long be worked to a profit; and whereas you the said Charles Middleton Kernot did, in pursuance of the said agreement, affect to take out a patent for your said alleged invention, but the same has not been and cannot be worked to a profit: Now I the undersigned William Potter do hereby give you notice, that the said patent has not been and cannot be worked to a profit, and that I henceforth intend, in consequence thereof, to discontinue any longer working or attempting to work the said patent beyond completing the execution of any contract now in hand.

Dated the 19th day of April, 1860. WILLIAM POTTER;" but that there was no foundation for the statement that the invention could not be worked at a profit: that the defendant Potter had attempted to prove in the action that the invention was not new, but had failed in the attempt, and that the validity of the patent had been established in the action, and the defendant Potter was still working according to the patent or some colorable imitation of it.

The prayer of the original bill was :

1. That an account might be taken of all the moneys which since the 28th of January, 1860, had become payable by the defendant to the plaintiff under the agreement as or by way of royalty on the moneys received by the defendant since that day for the sale of paraffine refined by him according to the plaintiff's invention, or according to any other process colorably differing therefrom, and that the defendant might be decreed to pay to the plaintiff the amount of the moneys which, upon taking that account, should be found to have become payable to the plaintiff, after giving the defendant credit for one moiety of all moneys expended by him in enabling the plaintiff to obtain the patent. 2. That the defendant might * be restrained by * 453 injunction from selling, during the continuance of the agreement, any crude paraffine, or any other paraffine, purified or prepared by or according to any process other than the patented invention of the plaintiff, the plaintiff undertaking and offering duly to observe and perform all things to be by him observed and performed according to the true intent and meaning of the agreement. 3. That it might be referred to Chambers to approve a proper deed of assignment of the patent, and that the defendant might be decreed to execute such deed, the plaintiff being willing and thereby offering to execute the same, or a counterpart thereof. 4. That if the Court should be of opinion that the agreement had been determined, an account might be taken of what, during the continuance of the said agreement, and since the aforesaid 28th day of January, 1860, became payable to the plaintiff as or by way of royalty under the agreement, and that an account might be taken of all paraffine purified or prepared by the defendant since the determination of the agreement by or according to the plaintiff's invention or any other process differing only colorably therefrom, and of the sales of such paraffine, and of the profits made

by the defendant thereby, and that the defendant might be ordered to pay to the plaintiff the amount of such profits, together with what should be found due to the plaintiff by way of royalty, the defendant being credited with one-half of the moneys expended by him in and about obtaining the patent. 5. That if the Court should be of opinion that the agreement had determined, the defendant might be restrained by injunction from manufacturing or selling paraffine purified or prepared by or according to the plaintiff's patented invention, or by or according to any mode or process colorably differing therefrom. 6. That the defendant might be decreed to pay the costs of the suit.

* 454 * The defendant Potter, by his answer to the bill, insisted that he had been induced to enter into the agreement by untrue representations made by the plaintiff, Dr. Kernot, and that the invention was not new, and could not be worked at a profit, and he denied that it had been established in the action that it could be so worked, or that the patent was valid; and he also stated that since he had given the notice he had not worked according to the patent, but according to a different mode, which was stated in the answer.

The cross-bill, as is stated above, was for the purpose of setting aside the agreement upon the ground of the misrepresentations alleged by the answer. There was much evidence in the causes mainly pointing to the question, whether the invention could be worked at a profit or not, as to which there was considerable conflict. It appeared, however, by the evidence on the part of the defendant Potter, that in the month of June, 1861, he wholly discontinued the business of purifying paraffine by any process whatever.

The Master of the Rolls having dismissed both bills with costs, each party appealed from the order dismissing his bill.

Mr. Grove, Mr. Selwyn and Mr. Lindley, for Dr. Kernot. — A licensee, by deed, or by agreement which has been carried into execution, cannot dispute the validity of the patent. *Lawes v. Purser*. (a) Even if the patent be invalid, the judgment at law is conclusive as to the validity at law of the agreement. There is no equitable ground for impeaching it, and the patent, even if it

(a) 6 El. & Bl. 930.

were bad, must for the present purpose be treated as good
 * so long as Potter chose to work it. He says it could not * 455
 be worked at a profit, but we could not have recovered dam-
 ages at law if that had been the case ; we are, therefore, entitled
 to the relief sought by our bill.

Mr. Baggallay, Mr. Kay, and Mr. Potter, for Potter.—The account sought for by the first paragraph of the prayer of Dr. Kernot's bill can only be sought for as ancillary to specific performance of the agreement or an injunction, and unless a case for specific performance or injunction is made out the plaintiff's remedy is at law. *Phillips v. Phillips*, (a) *Smith v. The London and South Western Railway Company*. (b) An injunction is out of the question, for we are not manufacturing paraffine at all, and do not intend to do so. The agreement is one of which the Court cannot decree entire specific performance, for it cannot compel Potter to work the patent, nor Dr. Kernot to teach him, and the Court will not grant partial specific performance. The case for an account, therefore, fails. Neither will the Court decree a deed of assignment to be executed, the agreement providing for a deed to be settled by a counsel as arbitrator. *Milnes v. Gery*, (c) *Darbey v. Whitaker*, (d) *Tillett v. Charing Cross Railway Company*, (e) *Gourlay v. Duke of Somerset*. (g)

Mr. Selwyn, in reply.—Dr. Kernot cannot proceed at law without first coming into equity to obtain an account of what paraffine Potter has sold, and a Court of Equity having thus got hold of the case will direct an account on the footing of the agreement independently of any question of specific performance.

Judgment reserved.

January 31.

* THE LORD JUSTICE KNIGHT BRUCE.—Upon these ap- * 456
 peals, the judgment obtained by Dr. Kernot in the action
 against Mr. Potter, tried in December, 1860, the record of which
 forms part of the evidence, appears to me to have a material bear-

(a) 9 Hare, 471.

(b) Kay, 408.

(c) 14 Ves. 400.

(d) 4 Drew. 134.

(e) 26 Beav. 419.

(g) 19 Ves. 429.

ing. That judgment decided Mr. Potter's pleas at law to be untrue, and established, I think, as between them, the legal validity and legal efficacy of the agreement of the 10th of January, 1859, stated in both the bills before us. And upon the whole of the evidence in the two causes I am of opinion that Mr. Potter has failed to show the agreement to be equitably or otherwise invalid, that his bill was plainly without foundation, that it was properly dismissed with costs, and that his appeal should be dismissed with costs likewise.

With regard to Dr. Kernot's suit, my learned brother agrees with me in thinking, that if it was right to dismiss Dr. Kernot's bill, it was one to be dismissed without, not with, costs, and to be dismissed without prejudice to any action or actions that he might be advised to bring against Mr. Potter, and considers that the Rolls order should be to that extent and in that way altered, and so it will be. For though my impression is that the relief, or part of the relief, asked by Dr. Kernot's bill should be given to him, yet my learned brother, for reasons that he will state; thinking otherwise, nothing more can be done here in Dr. Kernot's favour than what I have mentioned. His deposit will be returned of course.

The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as above, proceeded as follows :—

In disposing of these appeals it will be convenient, first, * 457 to consider the case upon the cross-bill. This bill * is, in substance, merely to impeach the validity of the agreement of the 10th of January, 1859; but it does not, so far as I can see, allege any ground on which that agreement, if valid at law, could be invalid in equity. In order to maintain the bill, therefore, it must be shown that the agreement was void at law; but the agreement has been tried at law, and Dr. Kernot has recovered upon it; and, taking it that the judgment in that action is not, as it may be, conclusive between the parties, a very strong case would certainly be required to warrant this Court in disaffirming what that judgment has affirmed. Now, so far from this case being strong, it seems to me, looking more especially to the recital of this agreement, to be almost destitute of foundation in this respect; and I am of opinion, therefore, that this bill was most properly dismissed

with costs, and that the costs of the appeal must follow the fate of the bill.

Then as to the decree in the original suit. So far as the bill rests upon the patent, independently of the agreement, it does not seem to me that any decree could properly be made upon it; for, assuming the mode of working described in the defendant Potter's answer to have been an infringement of the plaintiff Kernot's patent, the defendant Potter had, before the hearing, ceased to refine according to that mode or any other mode, and there having been no evidence of any intention on his part to resume the works, the Court could not, as I conceive, make any decree for the injunction to restrain infringement; and as to the account of profits derived from the alleged infringement, whether the account in such cases is to be considered as incident to the injunction or not, I am satisfied that the Court would not have been justified in treating the patent as having been conclusively established in the action at law, or in directing the account without a further trial being had at law; and I think the Court was quite right in not directing such a trial with a view to the account, when the plaintiff Kernot had his remedy at law without the Court's intervention. * 458

The case, therefore, upon the original bill, must rest upon the agreement, and upon that part of the case there are three points to be considered,—the account, the injunction, and the execution of the deed of assignment.

Now, first, as to the account. It is to be observed that this is not a case in which the Court can decree specific performance of the agreement in all its parts. It cannot decree the defendant to continue working the patent, and there are other provisions in the agreement as to which it would be difficult, to say the least, to decree a specific performance. It is further to be observed that the plaintiff has proceeded at law upon this agreement; and has recovered upon it, and he cannot, therefore, say that he has not his remedy at law; but it was said, on his behalf, that he could not proceed at law until the defendant Potter rendered the account, and that he was therefore drawn into equity to obtain it, and that a Court of Equity being thus, as it was said, seised of the case, ought to retain and work it out. There have been, however, many cases of this description, in which the remedy at law could not be successfully prosecuted until resort has first been had to a Court

of Equity, and it would certainly be going too far to say that in all such cases a Court of Equity would take the account. The course of the Court in such cases was much considered by Lord COTTENHAM in *The North Eastern Railway Company v. Martin*, (a) and he there laid down, what I conceive to be the true rule upon * 459 the subject, that such *cases are in the discretion of the Court, whether it will entertain the bill for an account or leave the parties to their remedy at law. In my view of this case, therefore, it is a question of discretion whether the Court ought to have entertained this bill for the account, and I am of opinion that it ought not. The account is part, and part only, of the substance of the agreement. The Court cannot do complete justice between the parties. It cannot enforce the agreement in all its parts, and it is not certainly according to its usual course to enforce agreements partially. It has done so indeed in some cases, of what may be termed negative covenants, but those have been cases in which the negative covenant has formed a distinct branch of the agreement. In this case the account cannot be separated from the rest of the agreement. We must look at the case too with reference to the probable convenience and inconvenience of entertaining such a bill. If, on the one hand, the agreement was being worked, there might be successive bills for the accounts. If, on the other hand, the agreement is not worked, the plaintiff Kernot's remedy could only be by action against Potter for non-performance of the agreement, and in that action the same question which is raised in this suit would again arise, whether the invention could be worked to a profit: so that there would be great danger of a conflict of decision between the Courts. I am satisfied, therefore, that this is not a case in which the Court ought, in the exercise of its discretion, to direct the account.

Then as to the injunction: the same reasons which apply to the injunction against the infringement of the patent seem to me to apply here also: the defendant is not working at all.

* 460 Lastly, as to the deed: I think the Court ought not * to decree the execution of it. It is part and part only of the entire agreement, and if the Court cannot perform the whole agreement, it ought not, I think, to interfere as to this part of it. The case of the *South Wales Company v. Wythes*, (b) supports

(a) 2 Phil. 758.

(b) 1 K. & J. 186, and 5 De G., M. & G. 880.

this view of the case. Upon the whole, therefore, I think that this original bill was properly dismissed ; but it is to be observed that when this bill was filed the defendant had refused to render any account, even up to the time when he had given the notice, and the plaintiff had also a case for coming to this Court upon the infringement ; and I think, therefore, the bill should not have been dismissed with costs. My opinion therefore is, that the decree in the original suit ought to be varied by dismissing the bill without costs, and that our order should be accordingly, the plaintiff Kernot of course taking back the deposit ; and although it may not be necessary, I think that, to prevent any possible misapprehension at law, the dismissal should be expressed to be without prejudice to the plaintiff Kernot's remedy at law. Being of opinion that the plaintiff Dr. Kernot ought in this case to be left to his remedy at law, I purposely abstain from giving any opinion upon the legal questions which were argued before us.

* PARMITER v. PARMITER.

* 461

1860. December 12. Before the LORDS JUSTICES. 1861. January 11.
Before the Lord Chancellor Lord CAMPBELL.

A debtor sent to one of the persons beneficially interested under the will of his creditor a promissory note insufficiently stamped for the amount of the debt, with a letter referring to the note as being for the money due: *Held*, that the letter was not of itself a sufficient promise or acknowledgment to exclude the operation of the Statute of Limitations, and that the note could not be received in evidence to show what the promise was, that being a direct and not a collateral purpose.¹

Leave given, on an application *ex parte*, to set down a petition of appeal where the appellant was not a party to the cause.²

THIS case came first before the Lords Justices upon a motion on behalf of the appellant for leave to set down the petition of appeal, although presented without leave.

The appellant was not a party to the cause, but had tendered

¹ See *Evans v. Prothero*, 2 Mac. & G. 319 and notes ; *Chitty Contr.* (9th Eng. ed.) 119.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1460, 1461, 1462 and notes.

under the decree a proof of a debt which had been allowed by the chief clerk in Chambers. On a summons to vary the certificate in this respect being adjourned into Court and coming on to be heard with the hearing of the cause on further consideration, Vice-Chancellor Wood directed that the chief clerk's certificate should be reviewed with respect to the debt in question, whereupon the appellant presented his petition of appeal from the Vice-Chancellor's decision, and obtained an order for the cause to be set down to be reheard. He was, however, advised, that this order was irregular for want of leave to present the petition having been previously obtained; and the object of the motion, which was made *ex parte*, was for leave to serve the order for setting down the petition of appeal, and bring on the appeal to be heard, although leave had not been obtained to present the petition.

Mr. C. Swanston, in support of the motion, said that *Mr. * 462 MUNROE*, the registrar, had referred to a case of ** Hodgson v. Clarke* (January, 1860), in which leave had been given on an *ex parte* application to present a petition of appeal, and he submitted that the Court might give the leave retrospectively.

Their Lordships directed, that the petitioner should be at liberty to serve the order for setting down the petition of appeal and to bring it on to be heard, notwithstanding leave to present the petition had not been previously obtained.

1861. January 11.

The appeal now came on to be heard, and the question was, whether there had been a sufficient acknowledgment to take the debt which was the subject of the appeal, out of the Statute of Limitations. The case is reported below in the 1st volume of *Messrs. Johnson and Hemming's Reports*, (a) where the facts are fully stated. They are shortly as follows:—

The appellant was the executor of *Mary Caines*, a deceased sister of the testator, and the debt which he claimed to be due to him as such executor from the estate of the testator consisted of a sum of 1000*l.* in respect of money lent by the testatrix to the testator, and of a legacy of 100*l.* due from the testator to the testatrix under the will of her mother, of which he was the executor.

The testatrix held as security for the 1000*l.* advanced and lent

by her to the testator a promissory note with an indorsement thereon, which were as follows : —

“ I promise to Mary Caines or order on demand the sum of eight hundred pounds with lawful interest for * the same * 463 for value received. This sixth day of August, one thousand eight hundred and eighteen.

“ 800*l*.

JAMES PARMITER.”

“ 1819, July 7th. — Received of Mary Caines the sum of 200*l*.

“ JAMES PARMITER.”

The testatrix held no security for the 100*l*. legacy bequeathed by the will of her mother, who died upwards of twenty years before the claim was made.

The testatrix, by her will dated 25th November, 1833, gave and bequeathed all her moneys, securities for money and all other her personal estate and effects to her executors Edward Parmiter (the claimant) and Thomas Parmiter, since deceased, upon trusts for realization and investment, and for payment of the interest and dividends arising therefrom unto her daughter Mary, the wife of James Parmiter the younger, for her life for her absolute use, with trusts in remainder for her children.

In 1854, the legatee for life under the testatrix's will requested a Mrs. Talbot (another sister of the testator) to mention to the testator her wish to have an acknowledgment for the amount due to the testatrix's estate, and Mrs. Talbot undertook to do so. A few days afterwards the legatee sent to Mrs. Talbot by post a penny receipt stamp for the purpose of her procuring to be written upon it such acknowledgment. Mrs. Talbot went to see the testator in the beginning of February, 1854, and asked him to send the legatee an acknowledgment for the amount due from him for her satisfaction, and at the same time handed to the testator the stamp which she had received. The testator thereupon wrote on the stamped paper and * signed the following promissory * 464 note, which Mrs. Talbot also signed as a witness : —

“ 1854, February 3d.

“ I promise to pay to Mr. James Parmiter the sum of eleven hundred pounds with four per cent interest on demand.

“ TAMZEY TALBOT,

JAMES PARMITER,

“ Witness.

Chaldron, Dorset.”

[363]

The legatee for life afterwards received a letter from the testator by post, in which he enclosed the above promissory note, and which was as follows:—

“ I have sent you a note for the money due to you which your brother left for you.

“ From your affectionate father,

“ 1854, February 3d,

JAS. PARMITER.

“ Chaldron Herring.”

These were the documents relied upon as excluding the effect of the Statute of Limitations.

Mr. Daniel and *Mr. Clement Swanston*, for the appellant. — The letter of itself is a sufficient acknowledgment, but if it were not, it is when coupled with the note which, although not stamped as a promissory note, may be referred to for the purpose of showing to what debt the letter refers, although not for the purpose of suing on the note itself as a promissory note. They referred to *Mountstephen v. Brooke*, (a) *Matheson v. Ross*, (b) *Evans v. Prothero*. (c)

Mr. Willcock, *Sir H. Cairns*, *Mr. Whitbread*, and
* 465 * *Mr. Bedwell*, for the respondents, were stopped by the Court.

THE LORD CHANCELLOR. — I am clearly of opinion that the Vice-Chancellor came to a right conclusion. It is admitted that when the letter was written, the remedy was barred. That being so, it was necessary to give evidence of a fresh promise, or of an acknowledgment from which in point of law a promise would be implied.¹ But the letter by itself was not sufficient, for it only says, “ I have sent you a note,” and it is necessary to see what the promise contained in the note was in order to ascertain whether it was absolute or subject to a condition. It was, however, contended, that the note was admissible for this purpose, which was

(a) 3 B. & Ald. 141.

(c) 1 De G., M. & G. 572.

(b) 2 H. L. Cas. 286.

¹ See *Chitty Contr.* (9th Eng. ed.) 761, 762, (10th Am. ed.) 925 *et seq.* and notes; *Smith v. Thorne*, 18 Q. B. 134, 143.

said to be a collateral purpose according to the decision of Lord St. LEONARDS in *Evans v. Prothero*, (a) where an unstamped receipt was admitted as evidence of an agreement; and so, in *Matheson v. Ross*, (b) a paper purporting to be a receipt was held to be admissible to prove the state of the accounts between the parties. But in this case, the note must be relied on to prove the promise itself, which is a direct and not a collateral purpose. I think that the Vice-Chancellor was right in holding that there was not sufficient evidence of a promise. The appeal must be dismissed with costs.

*FROGLEY v. PHILLIPS.

* 466

1861. January 11. Before the Lord Chancellor Lord CAMPBELL.

A bequest in trust for the testator's nephews and nieces "on both sides" held to extend to children of his wife's brothers and sisters.

THIS was an appeal from a decision of the Master of the Rolls, reported in the 30th volume of Mr. Beavan's Reports. (c)

Richard Phillips, by his will dated the 2d December, 1855, after giving (among others) pecuniary legacies to the plaintiff, his niece (the daughter of a sister of the testator), gave the residue of his estate to trustees upon trusts for sale and conversion, and division of the proceeds among "his said niece" and all his "other nephews and nieces on both sides," share and share alike. At the testator's death, there were living several children of his sister and several of a brother; there were also children of the brothers and sisters of the testator's wife, who claimed to be entitled to participate in the benefit of the bequest. The Master of the Rolls decided in favour of their claim, and the plaintiff appealed.

Mr. Lloyd, Mr. T. H. Terrell, and Mr. Druce, for the appellant, referred to *Stoddart v. Nelson* (d) and *Smith v. Lidiard*. (e)

(a) 1 De G., M. & G. 572.

(d) 6 De G., M. & G. 68.

(b) 2 H. L. Cas. 286.

(e) 3 K. & J. 252.

(c) Page 168.

Mr. Selwyn and *Mr. Dickinson*, for the defendants, were stopped by the Court.

The Lord Chancellor held that the words "on both sides" must have some effect given to them, and that according to their natural import they extended to nephews and nieces by affinity as well as by blood.

The appeal was dismissed with costs.

1860. December 20, 21, 22. 1861. January 11. Before the LORDS JUSTICES.

A lease of a farm contained a covenant on the part of the lessee against alienation or parting with possession without the lessor's assent, and a condition for re-entry in that event, whether occurring by act of the lessee, or by operation of law. The lessee became bankrupt. On a bill filed by the lessor, alleging that the assignees had elected to take the lease, and were about to assign it and to part with the possession without the lessor's assent, that the farm was within a short distance of the lessor's residence, and that it would cause personal annoyance to the lessor if the farm were assigned to a person not approved by him: *Held*, that a sufficient case of mischief was not made out to support an interlocutory injunction.¹

THIS was an appeal from an interlocutory order of Vice-Chancellor STUART granting an injunction to restrain the defendant from assigning a farm contrary to a covenant in the lease of it, and also directing the defendant to pay the costs of a motion, made on behalf of the plaintiff, for the committal of the defendant for a breach of a prior interim order made in the vacation by Vice-Chancellor KINDERSLEY.

The lease was dated the 26th of April, 1856, and made between

¹ See *Elmhirst v. Spencer*, 2 Mac. & G. 50; *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. Ap. 86; *Attorney-General v. Sheffield Gas Consumers Co.*, 3 De G., M. & G. 304 and notes; *Child v. Douglas*, 5 De G., M. & G. 739, 741; *Kerr Inj.* 14, 199.

the plaintiff of the one part and William Dray of the other part, and thereby the plaintiff demised to Dray, his executors, administrators, and assigns, the farm in question, which was called "Pedham Place Farm," at the yearly rent of 476*l*. The lease contained a covenant on the part of William Dray, that he, his executors, administrators, and assigns would not at any time during the continuance of the term assign, underlet, or otherwise dispose of or part with the possession of the farm or any part thereof to any person or persons whomsoever, without the consent in writing of the plaintiff, or the person or persons entitled as in the lease was mentioned first obtained for that purpose. The lease also contained a power of re-entry in case of any breach, default, non-performance, or non-observance of any of the covenants

* or agreements therein contained and on the tenant's part * 468 to be paid, observed, and performed, or in case William Dray, his executors, administrators, or assigns, or any of them, should by their or his own act, default, or procurement, whether voluntary or not, or by act of law, or by virtue of or under any Act of Parliament, or by or through all or any such means, lose, be deprived of, or cease to be entitled to the possession or enjoyment of the said farm, lands, and premises thereby demised, or any part thereof, or the term thereby granted, either wholly or in part, without the above-mentioned consent.

A counterpart of the lease was executed by William Dray, the defendant, who, in November, 1855, entered into possession of the farm. He continued in possession until after his bankruptcy, which took place in October, 1859, on a petition filed on the 21st of that month. The defendants, being appointed respectively the official and trade assignees, took possession of the farm, and, during November, 1859, and July, 1860, negotiations took place between the plaintiff and the assignees with reference to the lease and the sale of it. In the course of these negotiations the plaintiff refused to treat the assignees as entitled to the lease, or as entitled to sell or dispose of it without his license, or to permit the lease to be assigned to any person who should not be actually approved by him. The negotiations failed and determined in July, 1860. In July, 1860, the defendants paid 238*l*. for rent which accrued due on March 25th, 1860, and took a receipt, which was as follows:—

"In re Dray's Bankruptcy.

" July 6th, 1860.

" Received from the assignees the sum of 260*l.* 12*s.* 10*d.*

* 469 * for rent due from them in respect of Pedham Place, as under:—

	£	s.	d.
" Half-year's rent due at Lady-day last	238	0	0
" Deduct for income tax at 5 <i>d.</i>	4	17	2
	<hr/>		
	233	2	10
" Half-year's rent-charge	27	10	0
	<hr/>		
	£260	12	10
	<hr/>		

" P. H. DYKE."

The bill stated that this payment was made by the defendants on their own account as trade assignees, and that they, with the full knowledge of the lease and the covenants and conditions therein contained, had by such payment and otherwise signified their intention to elect, and in fact had elected, to accept the lease. The bill further stated, that on the 28th day of August, 1860, the plaintiff discovered that the defendants had advertised the lease for sale by auction on the 18th of September, and the bill contained the following allegation:—

"The said demised messuage and farm are from their size and otherwise of considerable importance, and they are within a short distance of Lullingstone Castle, in the county of Kent, where the plaintiff principally resides; and in granting the said lease the plaintiff was, as appears by the provisions thereof, particularly desirous of guarding against the possibility of the tenant of the messuage and farm not being a person of his own choosing; and it would cause great personal annoyance to the plaintiff if the messuage and farm were to be assigned to a person who should not be chosen or approved by the plaintiff."

* 470 * The bill charged that, under the circumstances therein mentioned, the defendants had become and were assigns of the lease by act and operation of the law, and that the covenants,

agreements, and conditions in the lease contained on the part of the lessee were in full force, and binding both at law and in equity upon the assignees. The bill prayed for an injunction against selling, assigning, underletting, or otherwise disposing of or parting with the possession of the messuage, farm, lands, hereditaments, and premises demised by the lease without the consent of the plaintiff.

A motion was made in the vacation before Vice-Chancellor KINDERSLEY for an interim order, which was made on the 13th of September.

The order under appeal, which was made on two motions, one to continue the interim injunction and the other to commit the defendants for a breach of it, was, so far as material, as follows:—

“This Court, as to the plaintiff’s motion to commit the defendants, doth not think fit to make any order upon the said defendants, other than that the said defendants, Robert Taylor and Herbert Harris Cannan, do pay unto the plaintiff, Sir Perryrall Hart Dyke, his costs of that application to be taxed by the taxing master. And as to the plaintiff’s motion for an injunction, his Honor doth order that an injunction be awarded against the defendants, Robert Taylor and Herbert Harris Cannan (in the plaintiff’s bill called Henry Cannan), to restrain the said defendants, their workmen and agents, until the hearing of this cause or the further order of this Court from selling, assigning, or underletting or otherwise disposing of or parting with the possession of the messuage, farm, lands, hereditaments, and premises * de- * 471 mised by the indenture of lease of the 26th April, 1856, in the plaintiff’s bill mentioned, or any of them or any part thereof respectively, without such consent as in the said indenture mentioned first had and obtained.”

The order also restrained the defendants from pulling down or removing certain buildings mentioned in the bill.

The case is reported in the 2d volume of Mr. Giffard’s reports. (a)

Mr. Bacon and *Mr. E. F. Smith*, for the assignees, in support of the appeal. — As to the motion to commit, the defendants never

in fact assigned or parted with the possession of the farm, and the order, therefore, is wrong in directing them to pay the costs. And with respect to the injunction itself, there was no sufficient ground for it. The right of the landlord under the lease (if any) is a legal right to enforce a forfeiture, which a Court of Equity will not assist. Nor is any ground alleged to justify an interlocutory application for an injunction. But, in truth, the plaintiff has not even a legal right, as the assignees are not bound by a covenant not to assign. *Doe v. Bevan*, (a) *Goring v. Warner*, (b) *Doe v. The Church-wardens of Rugeley*. (c) If there was a breach, the subsequent receipt of rent was a waiver.

Mr. Malins, *Mr. Southgate*, and *Mr. J. W. Chitty*, for the plaintiff. — The proviso contained in the lease for making it void * 472 * on assignment by operation of law distinguishes this case completely and effectually from *Doe v. Bevan*. (a) When the assignees elected to take, they took subject to the proviso, and the covenant ran with the land in equity, if not in law also. *Philpot v. Hoare*, (d) *Tatem v. Chaplin*, (e) *Doe v. Peck*, (g) *Spencer's Case*, (h) *Tulk v. Moxhay*. (i) The assignees electing to take were bound by all the covenants. *Hanson v. Stevenson*, (k) *Sir W. More's Case*. (l) The receipt of rent was only a waiver up to the time of the receipt. *Doe v. Harrison*, (m) *Doe v. Gladwin*, (n) *Doe v. Woodbridge*, (o) *Doe v. Jones*. (p)

Mr. Bacon, in reply.

1861. January 11.

THE LORD JUSTICE KNIGHT BRUCE. — The question, whether Mr. Stone was not in possession as the assignees' bailiff merely, appears to me on the materials before us doubtful, and I think that the consideration of the costs of the motion to commit should stand until the hearing of the cause or until further order, and that the order before us should be so far discharged without prejudice to

(a) 3 M. & Sel. 353.

(b) 7 Vin. Ab. 85, R. pl. 9.

(c) 6 Q. B. 107.

(d) 2 Atk. 219.

(e) 2 H. Bl. 133.

(g) 1 B. & Ad. 428.

(h) 6 Rep. 275.

(i) 2 Phill. 774.

(k) 1 B. & Ald. 303.

(l) Cro. Eliz. 26.

(m) 2 T. R. 425.

(n) 6 Q. B. 953.

(o) 9 B. & C. 376.

(p) 5 Exch. 498.

any question. With respect to the injunction against assigning, underletting, or otherwise parting with the possession of the farm, I think that, without prejudice also to any question, the order should be discharged, and the injunction, if it has issued, be dissolved. The case seems to me too doubtful for interference at this stage of the * proceedings, and I think that the inconvenience that would arise from sustaining the injunction erroneously will be greater than the inconvenience of discharging it erroneously.¹ * 473

THE LORD JUSTICE TURNER. — I am entirely of the same opinion. The question, whether the assignees ought to have been ordered to pay the costs of the motion to commit, depends, as it seems to me, upon the point whether Mr. Stone's possession was a possession as purchaser or as servant or agent of the assignees, and certainly the evidence has failed to satisfy my mind that he was in possession at all as a purchaser. But if not in possession as purchaser, he must have been in possession as the agent or servant of the assignees; and if the assignees are in possession by their agent or by their servant, it cannot be said that they have parted with the possession within the meaning of the injunction.

With respect to the point as to the assigning or underletting, I do not mean to give any opinion upon the question whether the plaintiff had or had not the right to insist upon the covenant contained in the lease or upon the terms of the proviso. What occurs to me is this, that there is not upon the bill such a case stated in equity as upon a doubtful question could induce this Court to interfere by injunction. I find no allegation upon the bill which has reference to any irreparable injury or any substantial injury which can be done to the plaintiff by the assignees' assigning, and thereby (if the plaintiff be correct in his assertion that a breach of the covenant will have been committed) giving him a right to eject immediately. I see no such case stated as will show that there will be irreparable injury,² such as * in my judgment ought * 474

¹ See *Child v. Douglas*, 5 De G., M. & G. 739; *Wason v. Sanborn*, 45 N. H. 169; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Bassett v. Salisbury Manuf. Co. and Salisbury Mills*, 47 N. H. 426; *Wilcox v. Wheeler*, 47 N. H. 488; 2 Dan. Ch. Pr. (4th Am. ed.) 1640, and cases in notes; *Ware v. Regent's Canal Co.*, 3 De G. & J. 230, 231, and note (1).

² By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury

to be shown to induce this Court to interfere in the case of a doubtful question. The only allegation which I find in the bill on the subject of injury is this: [His Lordship read the paragraph set out, *ante*, p. 469.]

That, however, is no more than might be said in every case where there is a covenant against assigning a lease. Of course no landlord inserts a covenant against the tenant assigning the lease, except for the purpose of securing to himself the selection of the person to whom the lease shall be assigned.

RIDGWAY v. NEWSTEAD.

1861. February 20, 23, 27. May 1, 4, 25. Before the Lord Chancellor Lord CAMPBELL.

A testator had mortgaged a leasehold brewery, and covenanted to pay the mortgage debt. By his will he bequeathed legacies and an annuity, and made a residuary devise and bequest. His son, to whom he bequeathed the equity of redemption in the brewery, carried on the business, and kept down the interest on the mortgage for thirteen years, and then (in 1856) became bankrupt. In the mean time the estate of the mortgagor had been administered by the executors, and the legacies paid and annuity kept down. In 1857, the mortgagee's representatives instituted a suit for the administration of the testator's estate, and payment of the balance of the mortgage debt (if any) which the proceeds of the mortgaged premises might be insufficient to satisfy. The mortgaged premises, having become depreciated, were sold for less than the debt, and the balance was certified to be due from the executors, and was ordered to be paid by them,¹ but

would be a grievous one, or at least a material one, and not adequately reparable by damages at law. *Pinchin v. London and Blackwall Railway Co.*, 5 De G., M. & G. 860; *Kerr Inj.* 199.

¹ "The better opinion is, that after a foreclosure, with or without a subsequent sale, the mortgagee may sue at law for the deficiency, to be ascertained in the one case by the proceeds of the sale, and in the other by an estimate and proof of the real value of the pledge at the time of the foreclosure." 4 Kent, 183; *Amory v. Fairbanks*, 3 Mass. 562; *Omaly v. Swan*, 3 Mason, 474; *Hatch v. White*, 2 Gall. 152; *Lansing v. Golet*, 9 Cowen, 346; *Lovell v. Leland*, 3 Vt. 581; *Cullum v. Emanuel*, 1 Ala. (N. S.), 23. Upon the question whether mortgaged estates or the general assets of the testator or intestate are to bear the burden of payment of mortgage debts, see Woolsten-

they were unable to pay it, whereupon, in 1860, the mortgagee's representatives filed a bill to have the mortgagor's residuary real estate applied in payment of his debts, so far as it would extend, and to compel the legatees and annuitant to refund. The residuary devisees had mortgaged their "portions, shares, and interests as residuary legatees and executors of and in the moneys to arise from the sale of" the testator's residuary real and personal estates: *Held*,—

1. That the lapse of time and intervening circumstances were a sufficient answer to the suit, so far as it sought to call on the legatees and mortgagees to refund.¹
2. That the mortgage made by the residuary devisees was subject to the payment of the testator's debts.

THESE were two appeals from a decision of Vice-Chancellor STUART, reported in the 2d vol. of Mr. Giffard's Reports. (a) The bill was filed by the representatives of a specialty creditor, under a covenant contained in a mortgage, and prayed for payment of the specialty debt out of the mortgagor's devised estates, * and that legatees and an annuitant under his will might * 475 be ordered to refund.

By the mortgage, which was dated the 8th December, 1838, leasehold lands, with the brewery, buildings, and machinery thereon, were assigned by Thomas Newstead (the testator) to Thomas Ridgway, for the residue of the term then subsisting therein, subject to redemption on repayment of 3000*l.* with interest at 5*l.* per cent, and the mortgage contained a covenant on the part of the testator, for himself, his heirs, executors, and administrators, with Thomas Ridgway, his executors, administrators, and assigns, in the usual form, for the repayment of the 3000*l.* and interest.

The testator died in March, 1843, having by his will, dated the 16th November, 1842, given all the residue of his real and personal estate to his son, the defendant William Meekley Newstead, and his daughter Lydia, the wife of the defendant Thomas Cheadle (then Lydia Newstead), their heirs, executors, administrators, and assigns, upon the trusts therein expressed, being trusts for sale,

croft v. Woolstencroft, 2 De G., F. & J. 347, note (1); Lady Langdale v. Briggs, 8 De G., M. & G. 391, and cases in note (3); Adams's Eq. (5th Am. ed.) [261], 507, 508, in note (2), [264], 515, note (1).

¹ See Kerr F. & M. (1st Am. ed.) 305-307; Wright v. Vanderplank, 8 De G., M. & G. 133, and note (1); Clegg v. Edmondson, 8 De G., M. & G. 787, 807, 808; Ernest v. Vivian, 33 L. J. Ch. 513; Attwood v. Small, 6 Cl. & Fin. 357.

(a) Page 492.

with a declaration that the proceeds were to be applied, after payment of debts and funeral and testamentary expenses, in raising a sufficient capital sum to produce 350*l.* per annum, and to invest the capital sum as therein mentioned, and pay out of the income (among other things) an annuity of 150*l.* to the testator's son, the defendant John Tenney Newstead, for his life, with a recommendation to the trustees, who were residuary legatees, to increase the annuity if the annuitant conducted himself to their satisfaction, and upon trust to lay out and invest the sum of 2000*l.* upon government or real securities, and to pay the income to the testator's daughter Mary Ann Boord (since deceased) and her assigns

* 476 for her separate use for her life, * and after her decease, to pay and transfer the capital to her children; and the testator gave the residue of all the said moneys unto and equally between William Meekley Newstead and Lydia Cheadle; and the testator constituted them his residuary devisees and legatees and joint executors of his will.

The testator died in November, 1842.

By an indenture dated February 5th, 1848, and made between William Meekley Newstead and Lydia Cheadle of the one part, and Joseph Fox of the other part, after reciting the will and the testator's death, and reciting that William Meekley Newstead and Lydia Cheadle had not yet been able to effect a sale of the testator's estates directed to be sold by the will, and reciting that the said William Meekley Newstead and Lydia Cheadle, having occasion for the sum of 1000*l.*, had requested Fox to lend them the same, which he had agreed to do on the security of a bond of even date, in which Thomas William Newstead joined as surety, and on the additional security of the assignment contained in the indenture now in statement: it was witnessed, that, in consideration of 1000*l.* paid to them by Fox, William Meekley Newstead and Lydia Cheadle thereby bargained, sold, assigned, transferred, and set over to Fox, his executors, administrators, and assigns, "all those the said portions, shares, and interests of them the said William Meekley Newstead and Lydia Cheadle, and each of them, as residuary legatees and executors under the said recited will of the said Thomas Newstead, deceased, as aforesaid of and in the moneys in the said will directed to be made of the testator's residuary real and personal estates, subject to the several annuities in the said will mentioned, and every part and parcel thereof," to hold

to Fox, his executors, * administrators, and assigns absolutely, but subject to a proviso for reassignment on repayment to Fox the sum of 1000*l.* with interest at 5*l.* per centum on the 5th day of August then next. * 477

In 1856, Fox instituted a suit against William Meekley Newstead, Lydia Cheadle and her husband, and other defendants, to enforce payment of the amount secured by the last mentioned deed, and by a decree made in that cause, dated the 5th December, 1857, it was ordered, that John Tenney Newstead, as heir-at-law of the above-mentioned Thomas William Newstead, who had made himself liable as a surety for the debt due to Fox, should on paying the balance stand in the place of Fox.

Accordingly, John Tenney Newstead paid off Fox's claim, and afterwards prosecuted the suit of *Fox v. Newstead*.

Under the decree in *Fox v. Newstead*, the real estate of the testator not specifically devised and not previously sold was sold, and the purchase-money was paid into Court to the credit of *Fox v. Newstead*.

In 1857, the representatives of Thomas Ridgway filed a bill against the executors and trustees of the will of Thomas Newstead, seeking an account of what was due on the mortgage of December, 1838, and that in default of payment the mortgaged premises might be sold and the moneys to arise from such sale be applied in satisfaction of what should be found due, and that in case of deficiency the same might be made good out of the estate of the mortgagor, and that his executors might admit assets, or that the usual * accounts might be taken and the estate * 478 administered, and that the suit might be taken as being on behalf of the plaintiffs and all other unsatisfied creditors of the mortgagor.

By the decree made on the hearing of that suit on the 21st January, 1858, the usual accounts were directed of the amount due on the mortgage of 1838, and in default of payment the mortgaged premises were ordered to be sold, and the proceeds to be applied in payment of the amount found due, with the usual directions of an administration decree in the event of a deficiency.

By a certificate made in that suit, dated the 23d April, 1859, it was certified that the defendants had made default in payment to the plaintiffs of the sum of 3285*l.* 16*s.* 1*d.*, which had been found due on the mortgage, and that the mortgage premises had been

sold for 850*l.*, and that there remained due to the plaintiffs upon their security 2553*l.* 3*s.* 8*d.* Upon the administration accounts a balance of 18,662*l.* 3*s.* 1*d.*, was certified to be due from the defendant William Meekley Newstead on account of the personal estate of the mortgagor, the chief clerk having among other things disallowed sums amounting in the whole to 2012*l.* 2*s.* 6*d.* which were claimed as having been paid to John Tenney Newstead on account of the annuity bequeathed to him by the testator, and also a sum of 2000*l.*, of which 1980*l.* had been paid by the defendants William Meekley Newstead and Lydia Cheadle into Court under the provisions of the Trustees Relief Act to an account "In the matter of the Trusts of Thomas Newstead's will, the account of the legacy of Mary Ann Boord, and her children," and had been, with accumulations, invested in the purchase of 2275*l.* 16*s.* 10*d.* 3*l.* per cent annuities, which were still standing to that account.

* 479 * On the 5th of July, 1859, an order was made in the administration suit on further consideration directing William Meekley Newstead within one month to pay 18,662*l.* 3*s.* 1*d.* into Court, and that, in the event of non-payment, the defendants should be at liberty to take such proceedings as they might be advised for getting in the sum of 2012*l.* 2*s.* 6*d.*, paid to the said defendant John Tenney Newstead, and to apply to the Court respecting the 2275*l.* 16*s.* 10*d.* 3*l.* per cent annuities standing in Court in the matter of the legacy of Mary Ann Boord and her children, and the cash in the bank on the like credit, and any interest on the said annuities, or any annuities to be purchased therewith.

On the 4th of January, 1860, the executors of Thomas Ridgway instituted the present suit, stating by their bill that Lydia Cheadle died in October, 1859, intestate, and without being entitled to any real or personal estate or effects, and that no administration had been taken out to her estate; that William Meekley Newstead and Thomas Cheadle had failed to make the payment directed by the order of the 5th July, 1859; that the defendant Thomas Cheadle remained out of the jurisdiction of the Court in order to avoid being served with process; that those defendants alleged, as the bill charged the fact to be, that they were unable to pay the said moneys or any part thereof, and that the same could not be recovered or applied in payment of what was due to the plaintiffs; that

the real estate of the testator not specifically devised had been sold in the above-mentioned suit of *Fox v. Newstead*, but that the proceeds which were in Court in that suit were not sufficient to pay the balance still remaining due to the plaintiffs. The bill charged that, under the circumstances aforesaid, the plaintiffs were entitled to resort for payment of what * was due * 480 to them to the sum of 2012*l.* 2*s.* 6*d.* paid out of the assets of the testator to John Tenney Newstead and to the bank annuities and cash produced by the investment and accumulation of the sum of 1980*l.* paid into Court under the Trustee Relief Act, and also, if necessary, to the real estate of the testator. The prayer was for a declaration that the moneys received by John Tenney Newstead from the executors on account of the annuity were assets of the testator applicable to the payment of his debts, and for an account of the moneys so received, and that John Tenney Newstead might be ordered to pay the same into Court, in order that the same might be duly administered. A similar declaration was sought as to the fund in Court under the Trustee Relief Act. And the bill prayed for the transfer of that fund to the credit of the present cause, to be applied in payment of the testator's debts in a due course of administration, and that the present suit might be taken as supplemental to the former.

The defendant John Tenney Newstead by his answer stated that the balance found in the certificate of the 23d of April, 1859, as due from William Meekley Newstead was not due, and that the certificate of 31st May, 1859, certifying that sums amounting to 2012*l.* 2*s.* 6*d.* had been paid to William Meekley Newstead on account of the annuity, was incorrect in that respect. The defendant further stated that he had not received any thing in respect of his own annuity, having, in 1843, sold it to William Meekley Newstead and Lydia Cheadle for 2000*l.*, and assigned it to them by an indenture dated the 16th of August, 1843; that the sums mentioned in the bill, amounting to 2012*l.* 2*s.* 6*d.*, were received by John Tenney Newstead from William Meekley Newstead and Lydia Cheadle as the price of his annuity which they had purchased from him.

* The defendants Boord, by their answer, stated that pre- * 481
viously to and after the testator's death, the defendant William Meekley Newstead carried on the business of a brewer on the mortgaged premises until 1856, when he failed, and that up to

that date the plaintiffs had received interest on their debt from him as the beneficial owner of the premises; that for many years the premises were an adequate security for the debt, but that, by reason of William Meekly Newstead's failure and the discontinuance of the brewery business, the value of the premises became diminished.

By the decree under appeal it was declared that the sum of 1270*l.* 13*s.* 7*d.* paid into Court in *Fox v. Newstead* was applicable to the payment of the debt due to the plaintiffs; and, as to the rest of the relief sought, the bill was dismissed without costs.

The appeal which first came on to be heard was that of the plaintiffs, who sought to have the decree varied so far as it dismissed the bill.

February 20, 23.

Mr. Bacon and *Mr. Hamilton. Humphreys*, for the plaintiffs. — The defendants attempt to set up a case of laches against the plaintiffs, but the plaintiffs were mortgagees, and were entitled to enforce all their remedies. They have done so without any delay of which the defendants can complain.

They referred to *Davies v. Nicolson*, (a) *Gillespie v. Alexander*, (b) *Greig v. Somerville*, (c) *March v. Russel*, (d) *Dilkes v. Broadmead*. (e)

* 482 * *Mr. Elmsley* and *Mr. Wickens*, for the defendant John Tenney Newstead. — If the plaintiffs could sustain their case, it is one of an equitable kind, and could only be supported if on the whole it would be more equitable to call on the legatees to refund, than to leave the parties in the position in which they are. A counter equity, such as that of the legatees having been allowed to remain undisturbed for many years, and to regulate their expenses and to contract obligations on the credit of the legacies, is sufficient answer to such an equity as the plaintiffs rely upon.

They referred to 3 & 4 Will. 4, c. 27, (g) *Bonney v. Rid-*

(a) 2 De G. & J. 693.

(b) 3 Russ. 130.

(c) 1 R. & M. 338.

(d) 3 Myl. & Cr. 31.

(e) 2 Giff. 113; 2 De G., F. & J. 566.

(g) Sect. 27.

[378]

gard, (a) *Gregory v. Gregory*, (b) *Beckford v. Wade*, (c) *Foster v. Hodgson*, (d) *Sherman v. Sherman*, (e) *Clegg v. Edmondson*. (g)

Mr. Selwyn and *Mr. Grenside*, for the defendants, the children of Mrs. Boord.

Mr. Bacon, in reply.

Judgment reserved.

February 27.

THE LORD CHANCELLOR. — The plaintiffs make out a *prima facie* case for the relief prayed by the facts alleged in the bill and not controverted. A creditor generally has a right after the death of the debtor not only to sue the personal representatives of the debtor who have in their hands assets unadministered, but to follow the assets of the debtor in the hands of a legatee. This doctrine is fully established by the cases of *Gillespie v. Alexander*, (h) *Greig v. Somerville*, (i) *March v. Russell*, (k) and *Davies v. Nicolson*. (l) The general rule was fully admitted in the recent case of *Dilkes v. Broadmead*, (m) in which we had occasion to consider the exception to it from the assets having been *bona fide* alienated by the legatee to a purchaser for value.

I have now to determine whether the defendants have rebutted the claim. The first answer, that there is no evidence of any assets of the creditor having come into the hands of the legatee John Tenney Newstead, must I think be overruled, for, although there were not payments of the annuity made to him, the sum which he received on the sale of the annuity must I think be considered as coming out of the estate of Thomas Newstead, the testator. Therefore, if the claim of the plaintiffs could be supported against John Tenney Newstead, he is equally liable as if he had received the

(a) 1 Cox, 145.

(b) G. Coop. 201; Jac. 631.

(c) 17 Ves. 87, 97.

(d) 19 Ves. 180.

(e) 2 Vern. 276.

(g) 8 De G., M. & G. 787.

(h) 3 Russ. 130.

(i) 1 R. & M. 338.

(k) 3 Myl. & Cr. 31.

(l) 2 De G. & J. 693.

(m) 2 De G., F. & J. 566.

amount of the sum paid to him, as the value of the annuity, by periodical payments of the arrears of the annuity.

The counsel for the defendants placed more reliance on lapse of time; and they strenuously contended that, without imputing any laches to the mortgagee or his representatives, or having regard to any of the particular circumstances of this case, * 484 the right of * the plaintiffs having accrued in 1842, and they not having taken any steps to enforce it till 1857, they are barred by the lapse of fifteen years. *Mr. Elmsley* urged truly that this is an equitable claim, the legal title to the assets paid to the legatees being in the legatees, subject to the equitable claim of the creditors of the testator; and he insisted that all equitable claims must be brought forward promptly. If he had added, "before the rights and liabilities of others have been varied by the lapse of time," I should have been disposed to acquiesce in his position.

He declined to give a definition of "promptly," or to fix any definite period of time within which the claim must be prosecuted, — denying, indeed, that twenty years or any certain period can be named; but arguing that as a period of eighteen years has been held to be sufficient to bar an equitable claim, a period of fifteen years must be held sufficient. He relied on the cases of *Bonney v. Ridgard* (a) and *Gregory v. Gregory*. (b) But when these cases are examined, although lapse of time is mentioned as the reason of the decision, it will be found that it was a lapse of time which had varied the rights and liabilities of others. In *Bonney v. Ridgard*, (a) Lord KENYON, then Master of the Rolls, says: "Here the many persons through whose hands the property has passed have relied on the undisturbed possession, and have laid out considerable sums of money in the improvement of it upon that idea." Another reason given by him is, that "it would be too much, at this length of time, to give the plaintiffs the relief required when the accounts cannot be taken." Therefore he thought it right to say "that the length of time was a bar in this case."

* 485 * In *Gregory v. Gregory*, Sir WILLIAM GRANT says, that in all the cases in which length of time has not been allowed to operate against the title to (equitable) relief, it has been

(a) 1 Cox, 145.

(b) 1 Coop. 201; Jac. 631.

shown that there has been a continuance of the circumstances under which the transaction first took place.

How then can these be considered as authorities to prove that, if circumstances remained exactly the same as at the commencement of the transaction, the lapse of fifteen years or of eighteen years is of itself a bar to the equitable relief prayed?

But although I cannot accede to the general rule contended for as to the effect of mere lapse of time, all circumstances remaining the same, I am of opinion that, in the present case, there are circumstances which, coupled with lapse of time, are a bar to the equitable relief prayed.

I by no means say that, generally speaking, any laches can be imputed to a mortgagee who, during any period, however long, regularly receives payment of the interest of his mortgage money, if he quietly relies upon all the remedies which the law gives in respect of the mortgaged land, and of the personal liability of the mortgagor. But, in the present case, I think that there are circumstances to take it out of the common rule as far as the equitable claim against the legatees of the mortgagor is concerned.

The mortgage for 3000*l.* at 5*l.* per cent interest, executed in 1838, was on buildings, machinery, and premises in which the mortgagor carried on the business of a brewer. The brewery was at that time considered an ample security for the mortgage money, and it so * continued after his death, when his son * 486 succeeded him in the business. The son carried on the business there till 1856, when he became bankrupt. The mortgaged premises were then sold, and the highest price that could be obtained for the whole of the mortgagor's interest in them was 850*l.* As to part, this interest consisted of a term for ninety-nine years; and as to the residue, of a term for 999 years. It was not till the result of the administration suit showed the insufficiency of the security, that the legatees were resorted to. I make no doubt that the legal claim against the unadministered assets remained in full force, but the equitable claim against the legatees I think was gone.

The consideration that this was a wearing security is not to be entirely disregarded, although probably an actuary would say that the value of the terms was very little reduced by the lapse of twenty years. But what I chiefly rely upon is the nature of the property mortgaged, which had acquired a temporary value from

the machinery erected upon it, and the good-will of the trade carried on in it. If the plaintiffs thought that this was a mortgage of "the potentiality of growing rich beyond the dreams of avarice," they cannot, when the boilers and vats produced so small a sum, reserve to themselves the remedy which they might have had if they had acted with prudence and discretion. Interest was received on the mortgage for twenty years at 5*l.* per cent, a rate considerably higher than the current rate of interest on good real security. From the sum which the mortgaged premises produced at the sale, it is quite clear that a considerable part of the estimated value at the time of the mortgage had consisted of the good-will of the trade. Indeed there can be no doubt as to the

* 487 deterioration, for at the hearing before the * Vice-Chancellor an inquiry was offered on this subject, and was declined.

The plaintiffs having preferred to receive the high interest, which has been said by very high authority to be "another name for insufficient security," is it just that they should now be allowed to come upon a legatee who by the terms of the will was to be in the receipt of an annuity of 150*l.* a year for his maintenance, and who must be supposed to have spent the amount year by year as he received it? Is not his situation altered and prejudiced by the delay? If the plaintiffs had made their demand upon him soon after the death of the testator, he would have known that he could not rely upon the annuity for his support, and he would have regulated his expenditure and mode of life accordingly. From the acquiescence by the mortgagees in the manner in which the estate of the testator was administered, might not the legatee have reasonably supposed that the mortgagees were contented with the sufficiency of their security, and that it would be absurd in him to forbear to enforce payment of his annuity, or to hoard it up half-year after half-year lest he should afterwards be called upon to pay back all that he had received. If it would be a hardship upon the mortgagees not to have full payment of the mortgage money on account of the trade carried on in the mortgaged premises having unexpectedly failed, would there not be a greater hardship on the legatee if he were called upon to pay back the sums which, with good faith and without imprudence, he has spent in the support of his family? The mortgagees clearly have no legal, and I am of opinion that they have no equitable, claim against him.

This seems to be the result which justice requires, and I

think it is consistent with the principles which * have * 488 guided this Court, and that it is not at variance with any former decision.

The appeal must therefore be dismissed. As the Vice-Chancellor refused costs to the defendants below from the peculiarity of the case, I shall dismiss the appeal without costs, and direct the deposit to be returned to the appellants.

May 1, 4.

The second appeal was that of John Tenney Newstead, and was against so much of the decree as declared that the money in Court, in *Fox v. Newstead*, was part of the unadministered assets of the testator.

Mr. Elmsley and *Mr. Wickens*, in support of the appeal. — The appellant is the transferee of Fox's mortgage, and that being a mortgage by the devisees was not subject to the testator's debts. Creditors cannot follow the assets into the hands of a purchaser for valuable consideration. The mortgagee was entitled to presume that the mortgage money would be properly applied. A charge for payment of debts is one which implies a power to give receipts.

They referred to *Spackman v. Timbrell*, (a) *Dilkes v. Broadmead*, (b) *Nugent v. Giffard*, (c) and *Page v. Adam*. (d)

Mr. Bacon and *Mr. Hamilton Humphreys*, for the plaintiff. — The mortgage is not of the devised estates, but of * the * 489 interest of mortgagors in them under the will. That interest was subject to the payment of the testator's debts. And whatever power the charge might imply to sell and give receipts to a purchaser, it would not authorize a mortgage.

They referred to *Moses v. Levi*, (e) *Stroughill v. Anstey*, (g) *Devaynes v. Robinson*, (h) *Ball v. Harris*. (i)

Mr. Elmsley, in reply.

(a) 8 Sim. 253, 257.

(b) 2 Giff. 113; 2 De G., F. & J. 566.

(c) 1 Atk. 463.

(g) 1 De G., M. & G. 635.

(d) 4 Beav. 269.

(h) 24 Beav. 86.

(e) 3 Y. & C. 359.

(i) 8 Sim. 485; 4 Myl. & Cr. 264.

May 25.

THE LORD CHANCELLOR.—The question on this appeal is, whether the sum of 1270*l.* 13*s.* 7*d.* is to be considered as part of the unadministered assets of Thomas Newstead, the mortgagor and testator, and applicable to the payment of a mortgage debt due to the plaintiffs, the executors and devisees of the mortgagee.

John Tenney Newstead, the appellant, bought the interest of Fox, to whom the executors and devisees of Thomas Newstead executed a mortgage of property devised by Thomas Newstead to them, subject to the payment of his debts.

The fund in question arose from the sale of this property, and must be considered as part of the estate of Thomas Newstead, unless Fox had acquired an interest in it to be considered prior and preferable to the claim of the creditors of Thomas Newstead.

* 490 * This I think depends upon the interest transferred by the executors and trustees of Thomas Newstead to Fox. Had they sold the property absolutely to him, he would not have been bound to see to the application of the purchase-money, and the creditors would have had no claim to the proceeds.¹ But upon examining attentively the transactions between the executors and trustees of Thomas Newstead and Fox, and having regard to the language of the mortgage-deed, I am of opinion that the security given to Fox was only upon the residuary interest which was to belong to the executors and trustees after payment of the debts of the testator. Therefore the right of the plaintiffs was prior and preferable to that of Fox, and is prior and preferable to that of the appellant. I bow to all the authorities cited by *Mr. Elmsley* on behalf of the appellant; but I do not think that they apply to the facts of this case when fully examined and ascertained.

If the fund now in dispute is part of the unadministered estate of the testator, I can entertain no doubt that it was applicable to the payment of the debt due to the executors of the mortgagee, and that the declaration of the Vice-Chancellor to that effect in this suit was quite correct.

I must therefore adjudge that this appeal be dismissed with costs.

¹ See 2 Sugden V. & P. (8th Am. ed.) 658, and notes; *Stroughill v. Anstey*, 1 De G., M. & G. 635, and note (2); *Langmead's Trusts*, 7 De G., M. & G. 353, and note (1).

* DRAKE v. SYMES.

* 491

1861. February 27, 28. Before the LORDS JUSTICES.

One of several co-plaintiffs obtained an order giving the plaintiffs leave to amend their bill by striking out his name on his giving security for the costs up to and including the summons. The bill was accordingly amended and was afterwards dismissed with costs for want of prosecution. *Held*, on the appeal of one of the remaining plaintiffs from both orders, that the defendants ought not to be further troubled with the suit, but that the costs should extend to the time of the actual amendment as regarded the first-mentioned plaintiff, and that the order should be without prejudice to any question between the co-plaintiffs.¹

THESE were appeals of Charles Drake, one of the plaintiffs, from two orders of Vice-Chancellor WOOD. One was made on the 21st November, 1860, directing that the plaintiffs might be at liberty to amend their bill by striking out the name of Graystone Burkes Baker, one of them, on procuring a sufficient person to enter into a bond with the clerk of records and writs, to answer the costs of the defendants up to and including the 9th of August, 1860. This order directed the plaintiff Baker to pay the costs of his co-plaintiffs and of the defendants of the application and of the security. The original bill was filed by Mary Drake, together with the appellant (who was her son) and Mr. Baker, against the directors of the International Life Insurance Company. In the suit numerous interlocutory applications were made. The appellant had on behalf of himself and his co-plaintiffs directed a motion to be made for an injunction, which was refused, and an appeal was dismissed with costs. Expenses were thus incurred amounting nearly to 500*l.*, and at length Mr. Baker, finding that the litigation must in any event be expensive, applied by summons for an order to amend the bill by striking out his name as a plaintiff, on his giving security for costs up to that time.

The summons was taken out of the 9th August, 1860, and was opposed by the plaintiff Drake, on the ground that the plaintiff Baker was colluding with the defendants. Affidavits were filed as to this, and ultimately the order of the 21st November, 1860, now under appeal, * was made. Soon afterwards the secu- * 492
rity was given, and the bill amended by omitting Mr. Baker's name as a plaintiff.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 403, 404.

On the 14th February, 1861, the defendants obtained an order to dismiss the bill with costs for want of prosecution.

The appellant appealed from both orders, and the appeals now came on together by leave of the Court.

Mr. Shapter and *Mr. Locock Webb*, in support of the appeals. — A plaintiff cannot separate himself from his co-plaintiffs, and throw upon the others the whole costs and risk of the suit. The amendment could only be made with the concurrence of all the plaintiffs. At all events the limitation of the costs to the 9th August was wrong, the order not having been made until the 21st November.

Mr. Daniel and *Mr. W. Morris*, for the plaintiff Baker. — A plaintiff does not, by joining with others in instituting a suit, become bound to carry it on longer than he thinks fit, but may retire on paying the costs incurred up to his retirement.

Mr. W. M. James, *Sir Hugh Cairns*, and *Mr. Cotton* were for the defendants.

Mr. Shapter, in reply.

* 493 * The following cases were referred to: *Holkirk v. Holkirk*, (a) *Winthrop v. Murray*, (b) *Small v. Attwood*, (c) *The Attorney-General v. Cooper*, (d) and *Brown v. Sawyer*. (e)

THE LORD JUSTICE KNIGHT BRUCE. — We mean to leave all matters entirely open between or among the three plaintiffs. The only question now is, whether we need put the defendants to any further inconvenience? We think not, and that they must have their costs against the three plaintiffs down to the date of the order for removing Mr. Baker from the record, and from that time against the two, and that the order should be without prejudice to any question among the three plaintiffs, or between any two of them. That will leave every question on the merits among the three plaintiffs open, which we mean to leave in that state.

The Lord Justice TURNER concurred.

(a) 4 Madd. 50.

(c) Younge, 407.

(e) 3 Beav. 598.

(b) 7 Hare, 152.

(d) 3 Myl. & Cr. 258.

[386]

* JOHNSON v. GALLAGHER.

* 494

JOHNSON v. CAZENOVE.

JOHNSON v. STURGIS.

1861. February 12, 19. March 15. Before the LORDS JUSTICES.

A married woman living apart from her husband, and having separate estate, carried on trade. After the death of her husband, tradesmen who had supplied her with goods in her trade filed a bill against her and her trustees for an account of her separate estate, and payment out of it of their demands for the price of the goods. Pending the suit, she mortgaged the property which had been her separate estate for valuable consideration, to an extent exceeding its value.

Held, by the Lord Justice KNIGHT BRUCE, that the dealings with the tradesmen were not such as to give them any remedy against the property which had been the separate estate, and by Lord Justice TURNER, that there would have been a remedy, but that the mortgage had taken it away.¹

Seem, per Lord Justice TURNER, —

1. That the separate estates of married women are bound by their debts, obligations, and engagements, contracted with reference to and upon the faith or credit of those estates.
2. That whether they were so contracted is to be judged of by all the circumstances of the case.²
3. That when a married woman having separate estate, and living apart from her husband, contracts debts, the Court will impute to her the intention of dealing with her separate estate.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 186, 187; *Greenough v. Shorrock*, 4 N. R. 40, L. J.J.; 3 N. R. 599, M. R.; *McHenry v. Davies*, L. R. 10 Eq. 88, 89.

² *Post*, 515, and note. Where a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable to the debt. *Picard v. Hine*, L. R. 5 Ch. Ap. 274. See *Johnson v. Vail*, 1 McCarter (N. J.), 423; *Perry Trusts*, § 660; *Butler v. Cumpston*, L. R. 7 Eq. 20, 21; *Matthewman's Case*, L. R. 3 Eq. 781. This subject was very fully discussed in *Willard v. Eastham*, 15 Gray, 328, where the Court say: "The rule adopted by most of the Courts in the United States has been materially different from that established in England; and the general current of American authorities supports the principle that a married woman has no power in relation to her separate estate but such as is expressly conferred in the creation of the estate; and that her separate estate is not chargeable with her debts or obligations, unless where a provision for that purpose is contained in the instrument creating the separate

THIS was an appeal from a decision of the Vice-Chancellor of the Court of Chancery of the County Palatine of Lancaster, holding that the separate estate of a married woman was applicable to the payment of a demand made by the plaintiffs, who were trustees under a creditor's deed executed by upholsterers, named John Burton and William Watson, in respect of goods sold and delivered to her.

The bill stated that, in 1849, John Burton and William Watson, who then carried on business in partnership at Liverpool, being acquainted with the defendant, Mrs. Jane Gallagher, as a customer, and having ascertained that she was a married woman, living at Liverpool, separate from her husband, who was residing at Manchester, and to whom she was in the habit of making a small
 * 495 allowance for his support, and supposing, therefore, that * she

estate. The decisions in the State of New York approximate somewhat more nearly to the English rule, but with some important qualifications." See *Jaques v. Methodist Episcopal Church*, 17 John. 548; *Dyett v. North American Coal Co.*, 20 Wend. 370; *Gardner v. Gardner*, 7 Paige, 112; *Curtis v. Engel*, 2 Sandf. 287; *Knowles v. McKamley*, 10 Paige, 343; *Cruger v. Cruger*, 5 Barb. 227; *Vanderheyden v. Mallony*, 1 Comst. 453. In the above case of *Willard v. Eastham*, 15 Gray, 335, the Court further say: "We think, upon mature and full consideration, that the whole doctrine of the liability of her separate estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications which are too subtle and refined. Our conclusion is, that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it." See *Yale v. Dederer*, 18 N. Y. 265; 1 Lead. Cas. in Eq. (3d Am. ed.) [394], 501, notes to *Hulme v. Tenant*; *Lewin Trusts* (5th Eng. ed.), 542 *et seq.*; *Manchester v. Sahler*, 47 Barb. 155; *Johnson v. Cummins*, 1 Green (N. J.), 97; *Hutchinson v. Underwood*, 27 Texas, 255. In *Rogers v. Ward*, 8 Allen, 387, it was decided that payment of a bond, given by a married woman for the price of land conveyed to her, to her sole and separate use, may be enforced out of her separate estate, so far as she has the right of disposal thereof, provided that no effectual remedy exists at law. And the creditor is not confined to collateral security held by him for the bond. In *Willard v. Eastham*, 15 Gray, 338, 334, allusion was made to the effect of recent legislation in Massachusetts upon the liability of the separate estates of married women for their debts.

had separate property, were in the habit of supplying her with goods to a large amount on credit.

The bill stated the particulars of several purchases of furniture by her from Messrs. Burton & Watson ; and that she had between 1856 and 1858 paid 284*l.* 10*s.* towards liquidation of her account, but that she refused to pay the balance of 372*l.* 2*s.* 6½*d.* The bill further stated, that on February 13th, 1858, Messrs. Burton & Watson assigned all their property in trust for their creditors to the plaintiffs; that Mrs. Gallagher's husband having died on October 20th, 1858, the plaintiffs had brought an action against her as his executrix *de son tort* for the above balance, and that it was then ascertained, and was the fact, that a deed of separation had been executed, dated the 16th June, 1856, and made between Mr. and Mrs. Gallagher of the first part, Mrs. Gallagher of the second part, and William Seabrook Chalkley, one of the defendants, a trustee for her, of the third part. That by this deed, after reciting differences between her and her husband, in consequence of which they had long lived separate from each other, and that Mrs. Gallagher had for some time past been carrying on in her own name, with the privity and assent of her husband, the business of a wine merchant at Liverpool, and that they had agreed to live separately, and that the husband should execute the assignment, and enter into the covenant therein contained, it was witnessed, that Thomas Gallagher assigned to the defendant Chalkley all and singular the money, securities for money, household chattels, stock in trade, and personal estate which the said Jane Gallagher had acquired, and which were then in her custody, or in the custody of any person or persons for or in trust for her, and also all sums of money which were then due in respect of the said trade or business, and all interest due or thenceforth * to grow due * 496 upon any of the same premises, and all the estate and interest of him the said T. Gallagher, of and in the said premises respectively, to hold the same premises upon the trusts thereby declared for converting the assigned property into money, and holding the same and the produce thereof in trust for such person or persons, and for such intents and purposes as Jane Gallagher should, notwithstanding her coverture, appoint; and in default of, and until such appointment, and so far as such appointment should not extend, in trust for Mrs. Gallagher for her sole and separate use. And that the deed contained a covenant on the part of the

husband that his wife might live separate from him, and carry on any trade or business she might think fit, and that all real and personal estate, to which she might become entitled, should be held and disposed of by her solely as she might think fit; and a covenant by the defendant Chalkley to indemnify the husband against his wife's debts. The bill stated that, upon the discovery of this deed, the action was discontinued.

The original bill, to which Mrs Gallagher and Mr. Chalkley were defendants, was filed in April, 1859, and sought payment of the balance claimed by the plaintiffs out of Mrs. Gallagher's separate estate under the deed of separation.

On the 7th of October, 1859, Mrs. Gallagher executed a bill of sale of that date, and made between Mrs. Gallagher of the one part, and the defendant Chalkley of the other part, whereby Mrs. Gallagher appointed, granted, and assigned to the defendant Chalkley, all the furniture, plate, linen, china, goods, chattels, and effects in certain houses specified in the bill of sale, being all the

*497 property comprised in the separation deed, free from * the trusts of that deed, but subject to redemption on repayment by her to Chalkley of 1390*l.* then due to him from her, and of any other moneys in which she might thereafter become indebted to him.

A second bill of sale dated the 29th November, 1859, was afterwards executed between the same parties.

Upon these bills of sale being set up, the bill was amended by stating them, and charging that they were fraudulently and collusively concerted between the defendants to defeat the plaintiffs' equitable rights.

The amended bill prayed, that the bill of sale might be declared fraudulent and void, or at all events void as against the plaintiffs' claim on the defendant Jane Gallagher's separate estate, and that the alleged debt to the defendant Chalkley might be postponed to the plaintiffs' claim, and for a declaration that the plaintiffs were entitled to be paid the balance of 372*l.* 2*s.* 6½*d.* with interest, and the costs of the suit, out of such parts of the separate estate of the defendant Jane Gallagher as were comprised in the deed of the 16th June, 1856, and subject to the trusts thereof, or out of any property which would be considered in equity as representing the said separate estate, and for a direction that the defendant Chalkley might pay them accordingly out of such separate estate, or the

rents and profits thereof, and that, in the event of the separate estate proving insufficient, the plaintiffs might be declared entitled to be paid the residue out of any other property to which Jane Gallagher was entitled for her separate use during her husband's lifetime; that in the event of the deficiency of her separate estate, and if she should appear to have parted with any portion thereof, except in payment of a separate debt incurred by her when covert, it might be declared that she was personally liable to * make good the same; and that as to any portion made * 498 away with by her, with the concurrence of the defendant Chalkley after notice to him of the plaintiffs' claim (except such parts as might have been applied for such separate debts as aforesaid), the defendant Chalkley might also be declared personally liable; that, if necessary, it might be declared that Jane Gallagher had wrongfully obtained possession of the property, and that the plaintiffs were entitled to a lien thereon for the amount of their claim, in priority to the claim of the defendant Chalkley, and that he might be declared a trustee thereof for them, and for an injunction and a receiver.

During the pendency of the suit the defendant Chalkley became bankrupt, and by the second of the above suits his assignees were brought before the Court.

Afterwards on the defendant Jane Gallagher being discharged under the provisions of the Act for the Relief of Insolvent Debtors, and all her estate having become vested in Mr. Sturgis, he was made a defendant by the third of the above suits.

By the decree under appeal, dated the 7th May, 1860, it was declared, that the separate estate of Mrs. Gallagher at the time of the death of her husband, and that Mrs. Gallagher herself, to the extent of the value thereof at that date, were respectively liable to the debts of the plaintiffs and the other separate creditors of Mrs. Gallagher, if any, in proportion to their respective separate debts; but that, as to any separate debt paid or satisfied by Mrs. Gallagher since the 20th October, 1858, the day of the death of her husband, she was entitled to stand in place of the creditors or creditor whose debts were so paid or satisfied to the extent * of such * 499 payment or satisfaction. The decree further declared, that under the bill of sale of the 7th October, the defendant Chalkley took no higher interest in the separate estate of Mrs. Gallagher

suit without having dealt with the property. Contracting a debt would not prevent her from dealing with her separate estate.

In the third place, the effect of the husband's death must here be regarded. That event made her absolute owner of the property.

The trust for separate use was at an end. The court cannot
* 502 create a separate estate * for the purpose of granting execution at the suit of a general creditor.

They also referred to *Field v. Sowle*, (a) *Aylett v. Ashton*. (b)

Mr. Bardswell appeared for the assignees of the defendant Chalkley, made parties by supplemental order.

Mr. Little (with whom was *Mr. G. M. Giffard*), for the plaintiffs. — Mrs. Gallagher has no ground for appealing, being without interest in the question. The property either belongs to Mr. Chalkley's assignees or to the plaintiffs and the other creditors. The first question is, whether any debt was contracted for which the separate estate was liable; and the next, whether Mr. Chalkley's security taken after the institution of the suit has defeated the rights of the creditors. As to the first question, there is no such rule as that a contract must be proved referring to the separate estate. A personal engagement is sufficient, especially where, as in the present case, the husband's circumstances were such as to exclude all possible contemplation of his liability. *Heatley v. Thomas*, (c) *Bullpin v. Clarke*, (d) *Hulme v. Tenant*, (e)

(a) 4 Russ. 112.

(c) 15 Ves. 596.

(b) 1 Myl. & Cr. 105.

(d) 17 Ves. 365.

(e) 1 Bro. C. C. 15. The following is an extract from the Registrar's book: —

Martha Hulme, widow, plaintiff. Richard Tenant and Frances his wife, and Thomas Watson, defendants.

Monday, 14 December, 1778.

Whereas Mr. Mansfield and Mr. Kenyon, of counsel for the plaintiff, this day came and offered divers reasons unto the Right Honorable the Lord High Chancellor of Great Britain, that the minutes made on the hearing of this cause on the 28th day of July last may be varied, by directing that an account may be taken of all sums of money arising by sale of any part of the estate and premises which were in mortgage to the defendant Thomas Watson and Gilbert Watson, deceased, for securing the repayment of the sum of 1000*l.* and interest, part of the separate estate of the defendant Frances Tenant, received by the defendant Thomas Watson, or by any other person by his order or for his use, and how

* *Owens v. Dickenson*, (a) *Wright v. Chard*, (b) *Vaughan v. Vanderstegen*, (c) *Clive v. Carew*. (d) Nor is the transaction altered by the circumstance of the husband having in this case died in his wife's lifetime. *Field v. Sowle*, (e) *Heatley v. Thomas*. (g) There being then *an engagement which * 504

the same has been from time to time applied and disposed of, and also that the Master may inquire whether the said defendant Frances Tenant hath any other and what separate estate, and how the same hath been from time to time disposed of; in the presence of Mr. Selwyn of counsel for the defendant Frances Tenant, and Mr. Lloyd of counsel for the defendant James Watson: Whereupon; and upon hearing what was alleged by the counsel for the said parties, and the defendant Frances Tenant, by her counsel, proposing to pay unto the plaintiff the interest due on his bond in the pleadings mentioned on or before the 25th day of January next, and the plaintiff, by his counsel, consenting on such payment thereof by the time aforesaid to accept the same without costs, his Lordship doth order that the said defendant do pay such principal and interest to the plaintiff by the time aforesaid; but in default thereof he doth order that the minutes of the 28th day of July, 1778, be varied by directing that an account be taken of all sums of money arising by will of any part of the estate and premises which were in mortgage to the said defendant James Watson and to the said Gilbert Dixon deceased, for securing the repayment of the sum of 1000*l.* and interest, part of the separate estate of the said defendant Frances Tenant, received by the said defendant Thomas Watson, or by any other person or persons by his order or for his use, and how the same has been from time to time applied and disposed; and also that the Master inquire whether the said defendant Frances Tenant hath any other and what separate estate, and how the same hath been from time to time disposed of.

(a) Cr. & Ph. 48.

(d) 1 J. & H. 199.

(b) 4 Drew. 673.

(e) 4 Russ. 112.

(c) 2 Drew. 165.

(g) 15 Ves. 596. The following is an extract from the Registrar's book:—

Ann Heatley, plaintiff. John Thomas, William Cousins, Leonard Currie, Benjamin Shaw, Samuel Kent, James Willes, and John Willes, defendants.

18th March, 1807.

His Honor doth order and decree that it be referred to Mr. Morris, one of the Masters of this Court, to take an account of what remained due to the plaintiff for principal and interest on the bond in the pleadings mentioned, and to tax her her costs of this suit, and his honor doth declare that the estates of the defendants James Willes and of William Johnson deceased, and the separate estate of Sarah Johnson deceased, in the pleadings mentioned, were jointly and severally liable to pay the principal and interest on the plaintiff's bond, and that the separate estate of the said Sarah Johnson is now liable to pay so much of what shall be reported due to the plaintiffs as shall not be recovered from the estate of the said James Willes, the said Sarah Johnson having given a bond to the said William Johnson, her late husband, to indemnify him against the plaintiff's demand: And it is ordered that the same be answered out of her

March 15.

* 507 *THE LORD JUSTICE KNIGHT BRUCE. — Previously to the year 1856, and in that year, a married woman living at Liverpool apart from her husband purchased goods on several occasions from a firm of upholsterers there. She bought the goods on credit, and from time to time paid them sums of money on account; by which means all the goods that she bought before 1856 were within a mere trifle paid for, and those bought in that year were in part paid for, but in respect of the last (those purchased in 1856) there remained and still remains a considerable sum (amounting to several hundred pounds) unsatisfied. To recover which last-mentioned sum this suit was instituted by the assignees of the estate of the sellers, from whom the purchaser did not obtain any of the goods by means of any fraud or deception. The sellers were aware from the commencement of their dealings with the purchaser, and throughout, of the fact of her being a married woman living apart from her husband, whose home seems to have been all along at Manchester, and her's continually at Liverpool. He was maintained in part, if not wholly, by means of an allowance which she made him, nor was he in any manner liable for the price or value of the goods, or any part of it. In every sense a stranger to the transactions which have been mentioned, he died in the year 1858, before the commencement of the suit. His wife, a defendant before us, did not become indebted for the goods or their price or value, for she was incapable of any such contract during the marriage, and she did not so contract after his death; and if she had never been a married woman, and the other facts had been as they were, she would not have become indebted to the furnishers of the goods or the plaintiffs, upon a written contract, or otherwise than simply and merely for the price or value of goods sold and delivered.

bank, and that, out of money so paid in, the subsequent costs to solicitors should be paid, and that in case the money so to arise should not be sufficient for payment of the principal of testatrix's debts, the Master was to apportion the residue of the money to arise from such sale as aforesaid (after payment thereof of the costs to be taxed as aforesaid), and also a sum of 451*l.* 9*s.* 1*d.*, together with any cash in the bank or to be paid into bank in the cause, or to be received for dividends ratably among the several creditors named in third schedule to the report according to the amount of the principal of the said debts therein set forth.

* It happened, that in the year 1856, previously to the * 508 transactions already mentioned of that year, the lady, Jane Gallagher by name, acquired by means of a settlement some property for her separate use, and the object of the present litigation is to subject that property to the payment of the price of the goods bought in that year, so far as unpaid. If for this purpose it was necessary for the plaintiffs to prove a specific or an express mortgage or appointment, direction, agreement, or declaration upon the part of Mrs. Gallagher, charging or purporting, professing, promising, or contracting to charge her separate property or part of it, the case of the plaintiffs has, I think, wholly failed. For in this respect the documentary evidence is none, and the other evidence (if writing be assumed to be unnecessary) appears to me too vague, too weak, and too thoroughly unsatisfactory to be of any weight or account. The case of the plaintiffs, therefore, if it can be supported at all, must in my judgment rest on the mere fact, that when the defendant, Mrs. Gallagher bought the goods of 1856 she was a married woman, having separate property and living apart from her husband, who, a stranger to the purchase, was not liable wholly or partially for the goods, or their price or value. Such a state of circumstances, whether the sellers when selling were aware or unaware that she had property settled to her separate use, was and is in my judgment insufficient to charge her or it, and I think the bill should stand dismissed.

THE LORD JUSTICE TURNER.—This appeal from the Duchy Court of Lancaster brings before us questions of great importance as to the rights and remedies of the creditors of married women against their separate estates, all the cases supposing, as was * observed by Lord Cottenham, in *Owens v. Dickenson*, (a) * 509 that married women having such estates can have creditors also.

Before entering into the facts of the case it may be as well to consider the nature and extent of the rights and remedies of such creditors, as established by the decisions of the Courts of Equity, or by conclusions which may fairly be drawn from those decisions. It is to be observed in the first place that the separate estate, against which these rights and remedies exist and are to be

enforced, is the creature of Courts of Equity, and that the rights and remedies themselves, therefore, can exist and be enforced in those Courts only. The Courts of Law recognize in married women no separate existence, no power to contract, and, except for some collateral and incidental purposes, no possession or enjoyment of property separate and apart from their husbands. They deny to married women both the power to contract and the power to enjoy. Courts of Equity on the other hand have, through the medium of trusts, created for married women rights and interests in property, both real and personal, separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has, in Courts of Equity, power to alienate, to contract, and to enjoy; in fact, to use the language of all the cases from the earliest to the latest, she is considered in a Court of Equity as a *feme sole* in respect of property thus settled or secured to her separate use. It is from this position of married women, and from the rights and powers incident to it, that the claims of creditors against separate estates of married women have arisen.

* 510 * It has not, so far as I am aware, ever been disputed that married women may incumber their separate estates by mortgage or charge. When any question has arisen on such securities, the question has been, not on the right to create the security, but upon the circumstances under which it has been created, as in *Mores v. Huish*, (a) a case which I take to have been decided wholly upon the circumstances. Again, there are very many cases, of which *Norton v. Turvill*, (b) *Stanford v. Marshall*, (c) *Peacock v. Monk*, (d) *Hulme v. Tenant*, (e) *Dillon v. Grace*, (g) *Heatley v. Thomas*, (h) *Bullpin v. Clarke*, (i) *Field v. Sowle*, (k) and *Stuart v. Lord Kirkwall*, (l) are some, which have established that the bonds, bills of exchange, and promissory notes of married women are payable out of their separate estates.¹ There

(a) 5 Ves. 692.

(c) 2 Atk. 68.

(b) 2 P. Wms. 144.

(d) 2 Ves. Sen. 190.

(e) 1 Bro. C. C. 15; and see *ante*, p. 502, note (e).

(g) 2 Sch. & Lef. 456.

(h) 15 Ves. 596; and see *ante*, p. 503, note (g).

(i) 17 Ves. 365.

(l) 3 Madd. 387.

(k) 4 Russ. 112.

¹ See *Willard v. Eastham*, 15 Gray, 334, 335; *Lewin Trusts* (5th Eng. ed.), 541, 542; *Perry Trusts*, § 657.

has, indeed, been much question as to the mode in which these instruments take effect against the separate estate, a point to which I shall presently advert, but that in some mode or other they take effect against it, cannot upon the authorities be denied. It has been a more disputed and is a more doubtful question whether the separate estates of married women are liable for their general engagements, such as tradesmen's bills and claims of that description. Looking at this question without reference to authorities, it is difficult to see upon what ground debts of this class can be distinguished from debts of the class to which I have last referred, what distinction there can for this purpose be between debts by specialty and debts by simple contract, and still more, what distinction there can be between simple * contract debts of * 511 different descriptions; and if no sound distinction can be drawn between the different classes of debts, the authorities which apply to the one class must, as it should seem, govern the other. I may add, too, that the cases which have been most adverse to the separate estates of married women being affected by their general engagements do not seem to me to furnish any, or at all events any satisfactory, grounds on which a distinction between the different classes of debts can be vested, or explain on what it can proceed.

With reference to the authorities upon this question, the case of *Hulme v. Tenant* (a) may well be considered as a resting-place. Before the decision of that case, there were not, so far as I have been able to find, many authorities bearing distinctly upon this question. The case of *Kenge v. Delavall*, (b) rather suggests that the creditors might, than decides that they would, have a claim against the separate estate. In *Clerk v. Miller*, (c) the wife by her answer had submitted to pay; but it is to be observed, that the only doubt suggested by the Court in that case was, whether, upon a mere parol promise to pay tradesmen, the wife's lands could be subjected to liability; no doubt is suggested but that her personal estate would be liable. In *Hulme v. Tenant*, (a) however, it was distinctly laid down by Lord ROSSLYN, that the separate estates of married women were liable for their general engagements. This case was followed by *The Duke of Bolton v.*

(a) 1 Bro. C. C. 15; and see *ante*, p. 502, note (e).

(b) 1 Vern. 326.

(c) 2 Atk. 379.

Williams, (a) which has been relied on in some of the subsequent cases in support of the position, that the separate estate is not liable for general engagements, but on examining that case

* 512 it does not seem to * me at all to have decided the question.

It was a bill of interpleader filed by the Duke of Bolton, whose estate was charged with an annuity, against the annuitant and other parties to whom the annuitant had granted other annuities: it was held, that the annuities thus granted were void by the statute, and, which is by no means unimportant, that the grantees of the void annuities had no lien or charge upon the annuity charged on the estate. There was no question, therefore, before the Court as to the arrears of that annuity. It is true that there are *dicta* to be found in that case as to the married woman not being liable to repay the consideration money, but then it must be remembered that the right to recover the consideration money for a void annuity proceeds upon an implied assumpsit which the law raises independently of, and indeed in opposition to, the actual contract, and it may well be that a Court of Equity would not follow the law to that extent, although it would hold the separate estate liable for the married woman's actual engagements. That the decision was not intended to impugn the doctrine laid down in *Hulme v. Tenant* (b) is, I think, clear, for in *Milnes v. Busk*, (c) I find the same learned judge who decided the case of *The Duke of Bolton v. Williams* (a) expressing himself thus as to the liabilities of married women having separate estates, "as to all her debts and engagements, with regard to that she shall be answerable as a *feme sole*."

Passing by the case of *Whistler v. Newman*, (d) which seems to have proceeded on the ground of a counter equity in the married woman against the trustees, and the case of *Mores v.*

* 513 *Huish*, (e) to which I * have already adverted, we come to the very important case of *Jones v. Harris*, (g) in which Lord ELDON, referring, as I presume, to *Whistler v. Newman* (d) and *Mores v. Huish*, (h) or perhaps to *Socket v. Wray*, (i) speaks of the doctrine in *Hulme v. Tenant*, (b) that a married

(a) 4 Bro. C. C. 297; 2 Ves. Jr. 138.

(b) 1 Bro. C. C. 15; and see *ante*, p. 502, note (e).

(c) 2 Ves. Jr. 498.

(g) 9 Ves. 493.

(d) 4 Ves. 129.

(h) 5 Ves. 693.

(e) 5 Ves. 692.

(i) 4 Bro. C. C. 483.

woman may charge her separate estate in other forms than those prescribed by the instrument creating the estate as having been shaken, and expresses a doubt whether, because a man contracts with a married woman, the Court would consider him in all events as contracting with her in respect of her separate estate, and ultimately decided that the consideration paid to a married woman in respect of an annuity void by the statute could not be recovered from her separate estate. It is to be remembered, however, that in that case the attempt was to charge the separate estate under the same circumstances in which the right to charge it had been denied in *Duke of Bolton v. Williams*, (a) and that Lord ELDON did not intend in *Jones v. Harris*, (b) to impugn the decision in *Hulme v. Tenant*, (c) by throwing the great weight of his opinion into the scale against it, may, I think, be fairly collected from what fell from him in the case of *Parke v. White*, (d) in which case, if I have rightly understood his observations, he rather complains of the decision in *Whistler v. Newman* (e) as not having been in conformity with the earlier authorities.

Since the case of *Jones v. Harris*, (b) there is not, so far as I am aware, any case opposed in any degree to the doctrine of the separate estate being liable for *general engage- *514 ments, except the case of *Aguilar v. Aguilar*, (g) which followed *Jones v. Harris*, (b) and the dicta of Sir JOHN LEACH in *Greatley v. Noble*, (h) and *Stuart v. Lord Kirkwall*, (i) and, on the contrary, the cases of *Murray v. Barlee*, (k) *Owens v. Dickenson*, (l) *Burke v. Tuile*, (m) *Vaughan v. Vanderstegen*, (n) and *Wright v. Chard* (o) contain very decisive dicta in favour of such liability.

The weight of authority, therefore, seems to me to be in favour of the liability. I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favour of it;

(a) 4 Bro. C. C. 297; 2 Ves. Jr. 138.

(b) 9 Ves. 493.

(c) 1 Bro. C. C. 15; and see *ante*, p. 502, note (e).

(d) 11 Ves. 209.

(k) 3 Myl. & K. 209.

(e) 4 Ves. 129.

(l) Cr. & Ph. 48.

(g) 5 Madd. 414.

(m) 19 Ir. Eq. & Law Rep. 467.

(h) 3 Madd. 79.

(n) 2 Drew. 165, 289, 363, 408.

(i) 3 Madd. 387.

(o) 4 Drew. 673.

and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate.

I am not prepared, however, to go the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The cases of *Jones v. Harris* (a) and *Aguilar v. Aguilar* (b) show that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity would not affect it. It

seems to follow, that to affect the separate estate there
 * 515 * must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband might not, as I apprehend, affect it in the case of a married woman, living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term "general engagement," when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely. *Aylett v. Ashton*. (c)

According to the best opinion which I can form of a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so or not is a question to be judged of by this Court upon all the circumstances of the case.¹ Lord LANGDALE, addressing himself to this question in *Tullett v. Armstrong*, (d) expresses himself thus : —

(a) 9 Ves. 493.

(c) 1 Myl. & Cr. 105.

(b) 5 Madd. 414.

(d) 4 Beav. 319.

¹ This is quoted as a statement of the true principle by Mr. Lewin Trusts (5th Eng. ed.), 546; Perry Trusts, § 659; *Butler v. Cumpston*, L. R. 7 Eq. 20, 21; *Matthewman's Case*, L. R. 8 Eq. 781. The extent to which this rule has been adopted or rejected in the United States is stated, and the cases cited, by Mr. Perry, in his work on Trusts §§ 660, 661.

"It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one, on her part that her separate estate, which would be the only means * of * 516 satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest, which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part where the instrument which she executes does not purport to bind or to pass any thing whatever that belongs to her, and where it must consequently be left to mere inference whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate."

And Lord REDESDALE, in *Dillon v. Grace*, (a) puts the case much in the same point of view, and although these cases may not have had reference to mere general engagements, I think they have an important bearing upon the question as to the effect of such engagements.

The separate estates of married women being thus far bound by their debts, obligations, and engagements, it has next become a question how far those debts, obligations, and engagements affect the *corpus* of the property, where the married woman has a limited interest only, as for instance a life-estate with a power of appointment. The cases on this subject may, as it * seems * 517 to me, well be classed under three heads: 1st, where the

(a) 2 Sch. & Lef. 456.

power of appointment has been general, by deed or writing or by will; 2d, where it has been by will only and the power has been exercised, and 3d, where there has been a limitation in default of appointment and the power has not been exercised. In cases falling under the third class there cannot, as it seems to me, be any reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment, and the case of *Nail v. Punter* (a) impliedly decides that point. In cases falling under the second class, where the power of appointment is by will only and has been exercised, but not for creditors, the authorities do not appear to me to be consistent. In *Norton v. Turvill*, (b) as explained in *Socket v. Wray*, (c) the exercise of the power by the will of the married woman seems to have been held to let in a bond creditor against the appointees under the will; and in *Hughes v. Wells* (d) I seem to have intimated that this might be the effect of the exercise of the power, as in other cases of the exercise of the general power of appointment by will, and certainly not upon the ground that power is property. But the Vice-Chancellor KINDERSLEY, in whose judgment I have quite as much confidence as in my own, seems to have dissented from *Hughes v. Wells* (d) in the case of *Vaughan v. Vanderstegen*, (e) and I observe that Sir WILLIAM GRANT has treated the point as doubtful in *Heatley v. Thomas*. (g) I say no more, therefore, upon this point than that it may be considered as open. But in cases falling under the first class, where the power of appointment has been by deed or writing or will, the Courts

* 518 * have certainly held the *corpus* of the property to be subject to the debts and engagements of the married woman. *Allen v. Papworth*, (h) *Hulme v. Tenant*, (i) *Heatley v. Thomas*, (g) although it is to be observed that during the life of the married woman the Court has never gone further than to affect the limited interest: *Hulme v. Tenant*, (i) *Field v. Soule*. (k) There has been much question in the cases on what grounds the Court has thus subjected the *corpus* of the property to the debts. In most, if not all, of these cases the liability of the *corpus* has

(a) 5 Sim. 555.

(b) 2 P. Wms. 144.

(c) 4 Bro. C. C. 483.

(d) 9 Hare, 749.

(e) 2 Drew. 165.

(g) 15 Ves. 596.

(h) 1 Ves. Sen. 163.

(i) 1 Bro. C. C. 15.

(k) 4 Russ. 112.

been put upon the ground that the instruments by which the debt was created or secured operated as executions of the power of appointment, but it seems clear that such instruments cannot operate as appointments in the strict sense of the term. They do not take effect according to their priorities. They create no lien or charge. *Hulme v. Tenant*, (a) *Duke of Bolton v. Williams*, (b) *Field v. Sowle*, (c) *Owens v. Dickenson*. (d) Lord COTTENHAM in the last of these cases, after giving his opinion that transactions of this description have no resemblance to the execution of powers, has said that what they are it is not easy to define, and no doubt there is much difficulty in defining them. Perhaps the nearest approach to a definition of them may be that they are transactions which create a debt payable out of the separate estate, and out of that estate only, and which in that sense, but in that sense only, have the character of appointments, and this, perhaps, is what Sir JOHN LEACH may have meant in *Field v. Sowle*, (c) where he speaks of the Court acting on the security of the wife, not as an agreement to charge her separate property, but as an equitable * appointment. In addition to * 519 what has been said in the cases with reference to such transactions taking effect as appointments, I may observe that it is difficult to see why, if they do so take effect, the creditors should not be entitled to immediate payment out of the *corpus*, although it has been uniformly held that they have no such right. With reference to these questions of payment out of the capital, through the medium of the exercise of powers, it may be as well to observe that if the doctrine as to these transactions taking effect as executions of powers is to be maintained at all, there may be a material distinction between bonds, bills, and promissory notes and mere general engagements, for it would be very difficult to say that a mere general engagement could in any case operate as an execution of a power.

The doctrine of appointment seems to me, however, to be exploded: ¹ *Owens v. Dickenson* (d) and *Anonymous*, (e) and it is scarcely less clear that the transactions do not create any lien or charge on the separate estate. It may well be asked, then how do

(a) 1 Bro. C. C. 15.

(d) Cr. & Ph. 48.

(b) 4 Bro. C. C. 297.

(e) 18 Ves. 258.

(c) 4 Russ. 112.

¹ See *Perry Trusts*, §§ 658, 659; *Lewin Trusts* (5th Eng. ed.), 542, 543.

they operate? I think the answer to this question is to be found in *Hulme v. Tenant*. (a) When a man contracts debt, both his person and his property are by law liable to the payment of it. A Court of Equity, having created the separate estate, has enabled married women to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This Court, therefore, as I conceive, gives execution against the property just as a Court of Law gives execution against the property of other debtors.¹ *Hulme v.*

* 520 *Tenant* (a) seems to have proceeded upon *this ground, and Lord ELDON seems to have considered it to be the right ground, for in *Nantes v. Corrock* (b) we find him refusing to enforce the claim of a creditor against the separate estate, on the ground that it consisted of stock which could not be taken in execution at law. In my opinion this is the true footing on which these cases stand. It is to be considered then what are the consequences which result. A legal debtor may alien his property before it is bound by judgment or execution. Why may not a married woman do the same as to her separate property? Her creditors are not appointees of the property. They have no lien or charge upon it. She may contract other debts, and all her creditors will be paid *pari passu*. *Anonymous*. (c) She may thus exhaust the fund by contracting fresh debts. Why may she not mortgage or alienate it? There is no instance, so far as I am aware, of this Court having restrained her from doing so; nor, so far as I can see, any principle on which such a restraint could be imposed. I think, therefore, that her power of alienation remains, notwithstanding any debts which she may have contracted. A Court of Equity will indeed, as it seems, enforce the right which she has created against her separate estate, after the determination of the coverture, or after her death. *Field v. Sowle*, (d) *Nail v. Punter*. (e) But in so doing it proceeds, as I apprehend, upon this principle, that having created the right as a *feme sole* she cannot, when she has actually become so, be permitted to disturb it. These cases therefore do not bear upon her power of alienation.

These being my views of the decisions as they stand upon

(a) 1 Bro. C. C. 15.

(d) 4 Russ. 112.

(b) 9 Ves. 182.

(e) 4 Sim. 474.

(c) 18 Ves. 258.

¹ See *MacHenry v. Davies*, L. R. 6 Eq. 462, 463.

the general questions as to the rights of creditors * against * 521 the separate estates of married women, it remains only to apply them to this particular case. The principal questions in the case, as I view it, are, first, whether there was any contract affecting the separate estate, and, secondly, whether, if there was any such contract, the separate estate has been taken out of the reach of it. As to the first of these questions: The defendant Jane Gallagher, at the time when the goods for which the plaintiffs claim to be paid were ordered and furnished, was living separate from her husband, and the evidence, I think, shows that the tradesman who supplied the goods supposed and believed that she had separate estate and dealt with her upon that assumption. So far, therefore, as they were concerned, they dealt on the footing of separate estate. How was it then on the part of the defendant Jane Gallagher? She was, as I have said, living separate from her husband and had separate estate, and I think that where, under such circumstances, a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate estate, unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which she purchased. The circumstances preclude the inference that she expected her husband to pay, and in this particular case it is impossible that she could so intend, as she was actually supporting her husband. How then could she intend that the payment should be made otherwise than out of her separate estate? It is indeed stated by her answer, and was argued for her at the bar, that the agreement was that payment should be made out of the profits derived from letting the houses. But it is clear that no reliance can be placed on what this woman has stated. The statement is in the highest degree improbable, and is positively denied, and I cannot doubt what the verdict of a jury would be if the * question was submitted to them. So far, * 522 therefore, as the first point is concerned, my opinion is in favour of the plaintiffs.

But upon the second point I can see no sufficient ground to impeach the assignment made to the defendant Chalkley. I think that there was power to assign, notwithstanding the bill filed, and that there was sufficient consideration for the assignment; and the legal title being in Chalkley, and there being possession under it, I think we cannot disturb his title. The consequence

appears to me to be that there could be no decree: not against the defendant Chalkley, because the bill impeaches the assignment to him for fraud, and the fraud is not established, and because, assuming that the plaintiffs could redeem (as to which I say nothing), there is no offer to redeem, and it was admitted at the bar that the property comprised in the mortgage is insufficient to answer the amount due upon it; not against the defendant Gallagher, because the demand against her can only be in respect of separate estate, and there is no separate estate which can be reached to answer the demand.

A subordinate point is raised by the bill, as to there having been fraud on the part of the defendant Gallagher in contracting the debt, and a liability consequent upon that fraud which this Court would enforce, but I think the plaintiffs have made no sufficient case for the interference of the Court upon that ground.

Upon the whole, therefore, I agree that the decree which the Vice-Chancellor has made cannot stand, and that this bill ought to have been dismissed. But, although I differ from his * 523 Honor's conclusion, I desire * to add that I am much impressed with the great difficulty of the case, and with the great care and attention which it is evident from the decree his Honor has given to the subject.

LETHBRIDGE v. LETHBRIDGE.¹

1861. March 5, 21. Before the LORDS JUSTICES.

A testator by his will empowered his trustees, out of the funds from time to time coming to their hands under the trusts thereinbefore contained, to expend such sums or sum of money as they should deem expedient in the repairs, and improvements, and insurance against fire of any of the messuages and other buildings, lands and hereditaments hereby devised, and, if they should think proper, to permit the person who might, under the trusts, be entitled to a life or other greater estate in the respective portions of the estates to occupy "the mansion-house, gardens, and *premises*," without paying any rent or compensation for the same, and without such person being obliged at his expense to keep the same in repair, or being at any other expense than paying the rates and taxes: *Held*, upon the context of

¹ S. C., 4 De G., F. & J. 35.

the will, and having regard to surrounding circumstances, that the tenant for life was entitled under this trust to occupy a park surrounding the mansion, and to have the vineries and forcing pits kept in repair, and the gardens kept stocked with plants, shrubs, and trees, at the expense of the trust estate.¹

THIS was an appeal from the decision of Vice-Chancellor STUART in part dismissing the petition of Sir John Hesketh Lethbridge, the question being whether, under the will of his father Sir Thomas Buckler Lethbridge, the testator in the cause, the petitioner was entitled to the enjoyment of a park free of rent, and to have a mansion and gardens kept up at the expense of the testator's estate.

The will was dated December 28, 1848, and thereby after giving a leasehold house at Bath, with the furniture and contents therein, to his wife, the testator gave and devised all his manors and estates (except his hereditaments in Cornwall) unto trustees, their heirs and assigns for ever, upon trust to receive the rents and profits thereof and to hold the same for the following purposes: namely, to pay interest upon any of the testator's debts and liabilities bearing interest, including mortgages; and also to pay all annuities and other * annual charges which the said testator's * 524 real and personal estate should be liable to pay at the time of his decease, and also to pay the interest of all such mortgage moneys as might be raised under the said will, and all expenses incident to the execution of the said will; and upon further trust to pay certain annuities to the testator's widow and children, including amongst them an annuity unto the testator's eldest son, the petitioner, and his assigns, during his life, of 1000*l.*, over and above such sum or sums as the testator might at the time of his decease be under engagement by settlement or otherwise annually to pay to him; and upon further trust to stand possessed of all such rents and profits for the special purpose thereafter particularly mentioned, and when such special purpose should have been fully satisfied, upon trust, first, as to the income arising from those parts of the said testator's estates which lay in the several parishes therein named, forming the Sandhill estate, to pay the same unto the petitioner and his assigns for life, and after his decease, upon trust to pay the same unto the testator's grandson, John Periam Lethbridge, the eldest son of the petitioner, and his assigns for life, and after his decease, upon trust to stand possessed of the

¹ See *Taylor v. Brooke*, 3 M. & Sel. 169.

same estates for the first and other sons of John Periam Lethbridge successively in tail male, with divers remainders over; and when the before-mentioned special purposes should have been fully satisfied, upon trust, secondly, as to the income arising from Charcote Lodge and other parts of the testator's estates in the several parishes therein named, forming the Luxborough estate, to pay the same to the testator's second son, Ambrose Goddard Lethbridge and his assigns for his life, and after his decease to stand possessed of the last-mentioned estates upon trust for the first and other sons of Ambrose Goddard Lethbridge and the heirs of their
* 525 respective bodies * in tail male; and in default of such issue, upon trust to pay the income from the last-mentioned estates unto the testator's third son, Thomas Prowse Lethbridge, and his assigns for life; and after his decease, upon trust to pay the same unto the testator's grandson, Charles Lethbridge, the eldest son of Thomas Prowse Lethbridge, and his assigns for his life; and after his decease to stand possessed of the last-mentioned estates upon trust for the first and other sons of Charles Lethbridge and the heirs of their respective bodies in tail male, with divers remainders over, with an ultimate limitation as to all the estates in trust for the testator's own right heirs for ever. And after bequeathing his leasehold estate, he gave his dinner services of plate to the trustees, in trust to permit and suffer the same to go with the testator's mansion of Sandhill Park, so far as the rules of law or equity would admit of, as or in the nature of heirlooms, to and in such manner that no person should acquire an absolute interest therein as tenant in tail under the limitations, unless and until such person should live to attain twenty-one, or die under that age leaving issue inheritable to such estate tail. And the testator exempted this part of his personal estate from the payment of his debts; and he authorized his executors or other his personal representatives for the time being to permit the furniture, pictures, books, and other movable appendages in his mansions of Sandhill Park and Charcote Lodge, and the offices and buildings thereto belonging in his mansions respectively, for the use and enjoyment of the party for the time being entitled to the occupation of such mansions under the trusts of his will; and for the aforesaid purpose he exempted the same from the payment of
his debts; and he authorized his executors to make such
* 526 * regulations respecting the said furniture, pictures, books,

and other movable appendages as might be necessary. And after devising an estate in Cornwall, and giving certain specific and pecuniary legacies, he directed that the residue of his personal estate should be applied in payment of his funeral and testamentary expenses and his debts and the charges and incumbrances on his estates and the legacies bequeathed by his will, and in keeping down the several annuities given by his will not expressly directed to be paid out of the rents and profits of his real estate.

By the clause upon which the question arose the testator directed the trustees for the time being acting under his will, out of the funds from time to time coming to their hands under the trusts thereinbefore contained, to expend such sums or sum of money as they should deem expedient in the repairs and improvements and insurance against fire of any of the messuages or buildings, lands, and hereditaments thereby devised as aforesaid, including the testator's mansion-houses of Sandhill Park and Charcote Lodge, and the fixtures, furniture, and effects therein respectively, and generally to make such expenditure in the amelioration and improvement of the trust estate during the continuance of the trusts thereby created, as the trustees for the time being should think proper and expedient; and that it should be lawful for the said trustees for the time being, if they or he should think proper, to permit the persons or person who might under the trusts thereinbefore declared be entitled to a life or other greater estate in the respective portions of the testator's Somersetshire estates, "to occupy the mansion-house, garden, and premises without paying any rent or compensation for the same, and without such person or persons being obliged, at his expense, to keep the same in repair, or * being at any other expense than paying the rates * 527 and taxes."

The testator died in 1849, and the present suit was instituted for the administration of his estate. Under an order made in it on the 15th January, 1859, the petitioner was let into possession of the mansion, but not of the park, which had been let by the trustees for grazing.

The petition prayed that the receiver in the cause might be directed, out of the rents and profits of the settled estates, to pay the expense of keeping the mansion-house, gardens, and premises called Sandhill Park in repair, and also to pay the expense of keeping the fruit and kitchen gardens, and the vinery and forcing-

pits, in a regular and proper course of cultivation, and also the expense of keeping the flower plants, shrubs, and ornamental trees in good order and condition, during the occupation of the same by the petitioner, in pursuance of the order of the 15th January, 1859; and that the petitioner might be declared entitled to the enjoyment of the gardens and premises so to be cultivated and that he might be at liberty to occupy the park; and that the receiver might be directed to let the petitioner into possession thereof; and that the costs of the petition might be costs in the cause.

By the order under appeal, dated the 20th July, 1860, it was ordered, that the trustees of the will should keep the mansion-house, garden, and premises called Sandhill Park in repair, but the rest of the petition was dismissed, and from this dismissal the petitioner appealed.

Sir F. Kelly, Mr. Bacon, and Mr. Springall Thompson, in support of the appeal. — The park consists of about 100 acres, the * 528 mansion * opens into it, and the deer come up to the house.

The ice-house used for the service of the mansion, and the water ram, and also the gardeners' cottages, are all situated in the park, and there is no access to them except from the park. The house and park have always been rated together, and they had never been severed in the lifetime of the testator, who never let the park or any portion of it. If the park did not go with the mansion, there must at all events be a right of way of necessity, or daily trespasses must take place. It cannot, however, be supposed that the testator intended merely to give the occupier of the mansion a right of way over the park.

They referred to *Earl Grosvenor v. Hampstead Junction Railway Company*, (a) *Hudson v. The London and South Western Railway Company*, (b) *Doe v. Willets*, (c) *Blackborn v. Edgley*. (d)

Mr. Amphlett and Mr. Piggot, for the trustees.

Mr. Purcell, for the tenants in tail next in remainder, did not oppose the application.

(a) 1 De G. & J. 454.

(c) 7 C. B. 709.

(b) 8 W. R. 467.

(d) 1 P. Wms. 602.

Mr. Elmsley and Mr. Cadman Jones, for creditors of the testator. — It is possible that if the mansion-house had been simply devised by that description, the park might have passed. This, however, is by no means clear, and need not be discussed, since the expression of the gardens in connection with the words "mansion-house" shows that the testator did not use the latter words to denote *any thing beyond their proper and re- *529 stricted signification. And the word "premises" means no more than the land immediately connected with the house. The park is not necessary for the convenient occupation of the house, and the testator only employs the word "occupy," not "use, occupy, and enjoy," and all that is given is the temporary occupation. It is not like a devise of the fee-simple. And with respect to the repairs, the direction does not extend to cultivation. Suppose a farm were similarly devised, could the tenant claim the expenses of the cultivation of the farm? The claim to have the gardens kept up is precisely similar.

Sir F. Kelly, in reply.

March 21.

THE LORD JUSTICE TURNER. — In this case there are two questions: first, whether the appellant, Sir John Hesketh Lethbridge, is entitled to occupy a park without paying any rent or compensation for it; and, secondly, whether he is entitled to have the gardens kept up at the expense of the trust.

The first question depends mainly, if not wholly, upon the meaning to be attached to the word "premises" in the occupation clause. By the will the testator has devised all his estates to his trustees, upon trust to receive and take the rents and profits of the estates, and to pay certain annuities, including the annuity of 1000*l.* to his eldest son, John Hesketh Lethbridge, for life, over and above such sum of money as he may at the time of his decease be under an engagement by settlement or otherwise annually to pay him. Then he has directed other annuities to be paid out of the rents, and has created *a special trust of the *530 surplus rents, after payment of the annuities vested in them, in trustees in trust to be applied in aid of his personal estate towards the payment of his debts; and that special trust is to continue until the debts are paid, and then one portion of what

may be called the Somersetshire estates, which is called the Sandhill Park estates, are devised to the eldest son Sir John Hesketh Lethbridge for life, with remainder to his son for life, with remainder to the first and other sons, in fact, in the course of a strict settlement; and the other portion of the Somersetshire estates (I call them Somersetshire estates though they are in different counties) are devised to the second son for life, with remainders in strict settlement to the first and other sons of the second son. The will then contains this clause:—

“And it shall be lawful for the said trustees for the time being, if they or he shall think proper, to permit the person or persons who may under the trusts before declared be entitled to a life or other greater estate in the respective portions of my Somersetshire estates to occupy the mansion-houses, gardens, and premises without paying any rent or compensation for the same, and without such person or persons being obliged, at his expense, to keep the same in repair, or being at any other expense than paying the rates and taxes.”

The first question is, What is the meaning of the word “premises” in that clause, “the mansion-houses, gardens, and premises”? In construing the clause, three points seem to me to be necessary to be attended to: first, the terms of the clause; secondly, the context of the will; and, thirdly, what may be termed the surrounding circumstances,—the circumstances as they stood at the time when the will was made. Now, as to the terms * 581 of the clause, the word “premises,” as here used,* seems to me to be used in its popular, and not in its legal sense. I have not been able to find throughout this will any *præmissa* to which the word “premises,” as here used, can properly be referred. Taking the word “premises,” then, to be used in the popular sense, two points appear to be clear: first, that the word “premises” was intended to extend to something beyond the garden, the terms of the devise being, “the mansion-houses, gardens, and premises;”¹ and, secondly, the word “premises” is large enough to include the park, if it appears by the context and surrounding circumstances that it was intended to be included. Then there is no doubt, on the other hand, that the word admits of a limited as well as an

¹ See *Taylor v. Brooke*, 3 M. & Sel. 169.

enlarged sense, and that the context and surrounding circumstances must determine whether it was used in an enlarged or in a limited sense. That brings us to consider the context of this will; and I have rarely, I must say, seen a will in which the context throws so little light — but still it does seem to me to cast some light — upon the intention of this testator. There is a clause in this will as to the furniture, which I think is important: —

“ And I authorize and empower my executors hereinafter named and appointed, or other my personal representative for the time being, to permit and suffer the furniture, pictures, books, and other movable appendages in my mansions of Sandhill Park and Charcote Lodge (Charcote Lodge was the mansion-house of the Somersetshire estates) and the offices and outbuildings thereto belonging in my said mansions respectively, for the use and enjoyment of the party for the time being entitled to the occupation of such mansions under the trusts of this my will, and for the aforesaid purposes I exempt the same from the payment of my debts, and authorize my executors or other personal representative to make such regulations respecting the said furniture, pictures, books, and * other movable appendages as may be * 532 necessary.”

There is also another clause in the will which immediately precedes the occupation clause, which is in these words: —

“ And I do hereby authorize and empower my trustees or trustee for the time being acting under this my will, out of the funds from time to time coming to their hands under the trusts hereinbefore contained, to expend such sum or sums of money as they shall deem expedient in the repairs and improvement and insurance against fire of any of the messuages and other buildings, lands, and hereditaments hereby devised as aforesaid, including my mansion-houses of Sandhill Park and Charcote Lodge, and the pictures, furniture, and effects therein respectively.”

These clauses seem to me to indicate, that the testator intended the property to be enjoyed by the devisees, if the devisees should be permitted to occupy it, as he himself enjoyed it. And the furniture clause seems to me to furnish a still more important argument in favour of the extended construction of the word “ premises,” for we

find in the furniture clause the words "offices and out-buildings;" and it may be asked, if the testator intended the word "premises," in the occupation clause, to extend only to offices and out-buildings, why did he not use those words in the occupation clause itself? If he intended the word "premises," in the occupation clause, to include more than the offices and out-buildings, where is the line to be drawn? The word is general, and there is no context to limit it. Then as to the surrounding circumstances: Sandhill Park (which is the description of the mansion-house) was the testator's mansion-house; the person who under the trusts of this will might be permitted to occupy it was the representative of the testator's family; the testator himself never occupied or

* 533 used this park for profit; the park runs up to the * mansion-house; the gardeners' cottages and the ice-house lie dispersed in the park. Can it reasonably be supposed that the testator could intend the representative of his family living in his mansion-house to be limited in his access to the mansion-house, cottages, and ice-house to a mere way of necessity? No doubt such a construction might be forced upon the Court by the terms of the clause or the context of the will. But here it is not, as it seems to me, favoured either by the terms of the context. It was said for the respondent, that the general words of the devise to the trustees could not be cut down by words so uncertain as "mansion-house, gardens, and premises;" but if the context and the surrounding circumstances interpret the words which are said to be uncertain, it is the plain duty of the Court to give effect to that interpretation. Again, it is said that the testator, having expressly mentioned the gardens, could not intend so large a property as the park, extending to about 100 acres, to be affected by the general word "premises;" and certainly I was much struck with that argument at the time when it was advanced. But, on the other hand, it must be remembered, that what the testator was here dealing with was, an occupation with the consent of the trustees, who would be the judges of what the exigencies of the estate might require.

Upon the whole, therefore, I think that, the trustees not objecting, the appellant is entitled to the occupation of the park, including the orchard, which, if not part of the park, is part of the premises, without paying any rent or compensation, but paying of course the rates and taxes; and in that respect there must be an order for the receiver to let the appellant into possession and

account for profits arising from the park since * the order * 584 to let the appellant into possession of the mansion-house was made.

The remaining question is, as to the right of the appellant to have the gardens kept up at the expense of the estate. This question seems to me to depend wholly on the effect to be attributed to the words, "and without being at any other expense than paying the rates and taxes." Both the original petition before the Vice-Chancellor and the petition of appeal founding itself, as I presume, on these words, prays that the trustees "may be ordered to pay the expense of keeping the fruit and kitchen gardens, and the vinery and forcing pits at Sandhill aforesaid, in a regular and proper course of cultivation, and also to pay the expense of keeping the flower plants, shrubs, and ornamental trees in good order and condition during the occupation of the same by the petitioner, in pursuance of the order made in this cause on the 15th of January, 1859." I think the petition in this respect goes too far. The words "any other expense than paying the rates and taxes" must, I think, be construed to refer to other expenses affecting the property, and not to expenses merely incident to the use and enjoyment of it. I think, however, that the prior words of that clause, "without such person or persons being obliged, at his expense, to keep the same in repair," are sufficient to throw and do throw on the estate not only the burden of keeping the vinery and forcing-pits in repair, to which the order of the Vice-Chancellor, as I understand it, extends, but also the burden of furnishing the gardens with any plants, shrubs, or trees which, in the judgment of the trustees, may be necessary for keeping up the same, and to this extent I think the order of the Vice-Chancellor should be enlarged.

* The costs of all parties should, I think, be costs in the * 585 cause, as they were ordered to be before the Vice-Chancellor.

THE LORD JUSTICE KNIGHT BRUCE.—I am of the same opinion.

[419]

SKOTTOWE *v.* WILLIAMS.

WILLIAMS *v.* SKOTTOWE.

1861. March 13, 16. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A testatrix gave a share in her residuary estate in trust for her daughter for life, with remainder to the daughter's children, and if none attained twenty-one (which happened), as she should appoint generally. In 1821, the daughter, without any legal advice except that of the acting trustee, who was a solicitor, and was under the will interested in the residuary estate, appointed that certain debts due from her husband to the testatrix should be accepted as part of the daughter's share. Her husband became soon afterwards bankrupt, and died in 1853, and she died in 1858, having, in settlements of accounts with the trustees, from time to time proceeded on the footing of the deed: *Held*, that a bill filed by her representatives in 1859, to set aside the deed, on the ground of the appointment being a dealing between trustee and *cestui que trust* to the advantage of the former and prejudice of the latter, under undue influence and without independent advice, was too late.¹

THIS was an appeal from the decision of Vice-Chancellor STUART in two suits: one seeking a declaration of the rights of the persons interested in the residuary estate of a testatrix named Catherine Mills, and the administration of her estate; and the other, seeking a declaration that a deed executed by a daughter of the testatrix, relating to the daughter's share under the testatrix's will, might be declared void, and delivered up to be cancelled.

The testatrix, Catherine Mills, by her will dated the 8th June, 1818, after bequeathing general specific legacies and annuities, gave the residue of her real and personal estate to Richard Williams and Charles Mills, their heirs, executors, administrators, and assigns, upon *trust for sale, conversion, and collection, and to divide the proceeds into three equal parts,

¹ See *De Montmorency v. Devereux*, 7 Cl. & Fin. (Am. ed.) 188, note (1); *Graham v. Birkenhead & Co., Railway Co.*, 2 Mac. & G. 146, note (2), and cases cited; *Coles v. Sims*, 5 De G., M. & G. 1, in note; *Great Western Railway Co. v. Oxford & Co., Railway Co.*, 3 De G., M. & G. 341; *Ormes v. Beadel*, 2 De G., F. & J. 333; *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 73; 1 *Sugden V. & P.* (8th Eng. ed.) 252, and cases in note (2); *Kerr F. & M.* (1 Am. ed.) 296 *et seq.*

whereof the testatrix gave one to her son Charles Mills absolutely, and another to her daughter Charlotte Mills absolutely, and as to the remaining third part, directed her trustees to invest the same, and pay the yearly proceeds thereof to the testatrix's daughter, Catherine Edwards, for life for her separate use, and after her decease to pay and transfer the same to such one or more of Mrs. Edwards' children as she should appoint, and subject to such appointment to her child or children who should attain twenty-one, or being daughters or a daughter, attain that age or marry; and if there should be no such child who, under the trusts, should become entitled to a vested interest, upon trust to pay and assign the share to such persons or person as Mrs. Edwards should by deed or will appoint, and subject to such appointment to Mrs. Edwards, her executors or administrators.

On the 12th of March, 1821, the testatrix died, and her will was proved by Charles Mills alone.

Mrs. Edwards had one child only, which died at the age of eight months, or thereabouts.

By an indenture dated the 14th May, 1821, being the deed sought to be impeached by the second suit, and made between Mrs. Edwards of the first part, her husband George Hay Edwards of the second part, and Charles Mills of the third part, after reciting that Mr. Edwards was indebted to the testatrix in the following sums; viz., 400*l.*, 400*l.* 3*l.* per cent consols, and 2900*l.* 3*l.* per cent reduced annuities, and 498*l.* sterling, and that Mrs. Edwards had agreed that such sums should be deemed and taken as and in part satisfaction of the share by the testatrix's will given for the benefit of Mrs. Edwards and her issue: it was witnessed, that in * consideration of the premises it was thereby agreed * 537 and declared between and by the several parties thereto, and particularly Mrs. Edwards directed and appointed, that the several sums of money or debts and bank annuities so respectively due and owing from Mr. Edwards as aforesaid should be and the same were thereby accordingly accepted and taken by Mrs. Edwards, her appointees, executors, administrators, and assigns, as and for so much and in part satisfaction (the *quantum* whereof to be the amount of the market price of such stock respectively at the time of the re-transfer thereof respectively) of the one-third part or share by the will of the testatrix given or intrusted to or for the benefit of Mrs. Edwards and her issue of or in the produce of the

residuary real and personal estate of the testatrix, and the rents, profits, interest, dividends, and other annual produce thereof, and that Charles Mills, his executors, administrators, and assigns, should stand and be possessed of the several last-mentioned sums, and the dividends, interest, and annual produce thereof, upon the same trusts, intents, and purposes, and with and subject to such and the same powers and provisos as in the said will were expressed of and concerning the said last-mentioned third part or share of or in the produce of the said residuary real and personal estate, and the interest, dividends, and annual produce thereof.

In 1822 Mr. Edwards was declared a bankrupt, and Charles Mills, as executor of testatrix, proved against the bankrupt's estate for, and received dividends upon, the four debts.

Charles Mills died in 1826, having by his will appointed his sister Charlotte Mills and Augustine Mills Skottowe executrix and executor. They had both since died, and Charles Mills *538 Skottowe, the plaintiff in the * first, and one of the defendants in the second, of the above suits was the executor of the survivor, and also administrator *de bonis non* of the testatrix Catherine Mills. George Hay Edwards died in 1853.

Mrs. Edwards died on November 19th, 1858, having bequeathed her residuary estate to the appellants, who were the plaintiffs in the second suit, and she appointed William Henry Newman and Catherine Byrne her executor and executrix.

The bill in the second suit charged that the deed of 1821 was executed by Mrs. Edwards, under the influence of Charles Mills, in ignorance of her rights, and was moreover an invalid execution of the power contained in Mrs. Mills' will, and prayed that the deed might be delivered up to be cancelled, or if not, that the share of Charles Mills might not benefit by the operation of the deed.

In support of the charge contained in the bill in the second suit, the Rev. John Williams, one of the appellants, deposed that he was intimately acquainted with Mrs. Edwards for some years previously to her decease, and that she frequently stated to him in conversation, and particularly in the summer of 1855, when he was staying on a visit at her house at Southampton, that she was in no way indebted to the estate of her mother, the testatrix, Catherine Mills, and that all claims upon her by the trustees of her mother had long before that time been liquidated, and that at

the same time Mrs. Edwards expressed a wish to arrange her affairs, and that it was during these negotiations that the witness first became aware of the existence of the deed of the 14th May, 1821, and that he believed that even at that time Mrs. Edwards was * under the full impression that the deed was * 539 made to carry out the wishes of her mother, and in accordance with the directions contained in her mother's will. That it was not until 1857 that Mrs. Edwards was informed and made aware of her rights under her mother's will, and that the deed was a fraud upon those rights, she having always previously believed that her share of the residuary estate of her mother was, by her mother's will, less than the shares of Charles Mills and Charlotte Mills. That, as soon as Mrs. Edwards became aware as aforesaid of her true rights under her mother's will, she desisted from attempts which had been previously made to come to an arrangement with Charles Mills Skottowe and Susannah Anne Proctor, who were the persons beneficially interested under the will of Charles Mills, and who persisted in setting up the deed and charging Mrs. Edwards' share of her mother's residuary estate with the debts of her husband; and that thereupon Mrs. Edwards discontinued all negotiations with them on the subject; and that upon that occasion Mrs. Edwards said to the witness, "Let them fight for it after my death." The other material facts of the case, and the arguments relied upon, appear from the judgments.

By the decree under appeal it was declared, that the deed was valid and binding, and accounts and inquiries were directed on that footing.

Mr. Malins and *Mr. Gill*, for the appellants.

Mr. Green, *Mr. Jessel*, and *Mr. Dryden*, for the plaintiff in the first suit.

Mr. Emsley, *Mr. Baggallay*, *Mr. Godfrey Lushington*, *Mr. Tripp*, and *Mr. Haviland Burke*, for other respondents.

* The following cases were cited: *Archer v. Hudson*, (a) * 540

(a) 7 Beav. 551.

Wedderburn v. Wedderburn, (a) *Charmer v. Bradley*, (b)
Reid v. Shergold, (c) and *Zouch v. Parsons*. (d)

Mr. Malins, in reply.

THE LORD CHANCELLOR. — I am clearly of opinion that the decision of the Vice-Chancellor ought to be affirmed, and that the petition of appeal should be dismissed with costs. There is no ground for saying that the deed was void when it was executed. Indeed, that argument has not been relied upon now on the part of the appellant. It is quite clear that this was a deed which, notwithstanding the coverture of Mrs. Edwards, she might have executed so as to have made all the dispositions of the property which were made by the deed, if she had been properly advised, and if there were no circumstances to impeach the transaction. It was a deed capable of being affirmed. Now I am not at all convinced that there was, in the transaction on the part of Mr. Charles Mills, any actual fraud. It is a mere assumption that the debt due from Mr. Edwards was a bad debt. Nor, although the bankruptcy happened soon afterwards, does it appear that what Mrs. Edwards says in her letter is not true, namely, that bankruptcy was not at all in contemplation. The trade seems to have been going on without any danger of immediate disruption, and it is not at all proved to me that the debt was desperate, especially when we look at the dividend that was actually paid * 541 * when the bankruptcy did supervene. It may be that at the time when the deed was executed, the estate might be considered a solvent one. I likewise take into view, to a certain degree, the consideration that was suggested as to the advantages that might arise to the husband.

I do not think that the deed can be considered as being void on the ground of actual fraud, but I think that as this was a dealing between *cestui que trust* and trustee, Charles Mills ought to have called in and have furnished Mrs. Edwards with independent advice. It seems clear, however, that he was the only legal functionary who intervened, and that he actually drew the deed, Mrs. Edwards having had no other advice whatsoever. It certainly was a

(a) 4 Myl. & Cr. 111; 2 Keen, 722.

(c) 10 Ves. 370.

(b) 1 J. & W. 51.

(d) 3 Burr. 1794.

deed from which he might have derived some advantage, and which I think must be considered as imperilling the provision that was intended for the benefit of her and her children. These might have been grounds for holding that the deed was impeachable within a reasonable time after it had been executed. But I am of opinion that there is no pretence for impeaching it now. There appears to me no ground for saying that there was any misrepresentation, or that she was led to the belief that her share was less than that of her brother and sister. She knew the contents of the will and of the deed, and, that being so, she acted for many years in the most solemn manner upon the footing of the deed, and settled an account year by year upon that footing. Can it be said that if she had survived up to the time when this bill was filed, she could have filed a bill to set aside the deed which she had been acting upon for so many years? It would be preposterous to say so; and if she could not, her representatives are in no better situation.

* THE LORD JUSTICE KNIGHT BRUCE. — I think it neither proved nor to be inferred that in the transaction of May, 1821, Mrs. Catherine Edwards was cheated or deceived; but I think it highly probable, if not absolutely clear, that during the whole of the life of Mr. Charles Mills, after the date of the instrument of May, 1821, and for some time even after his decease, she, by reason of the position of Mr. Charles Mills as trustee with respect to her and to the property, was entitled to impeach the instrument and to set it aside. Mr. Charles Mills died in the year 1826. The suits before us were instituted in the month of November, 1859, not sooner; and during the long interval between those two years, it is manifest that acts were done and a line of conduct pursued by this lady amply sufficient to confirm the transaction, if originally impeachable, as I believe it to have been. The only question before us is, whether by means of a suit instituted in November, 1859, after such a course of conduct, this instrument could be successfully impeached. I think that this was plainly impossible. The transaction was simply confirmed in my judgment, — confirmed within every rule of the Court applicable to this subject. The appeal seems to me manifestly groundless.

THE LORD JUSTICE TURNER. — I am also of opinion that this

appeal must be dismissed with costs. It is not necessary for us to give any opinion upon the question whether the deed of 1821 was originally impeachable or not; but I confess I am not satisfied that the deed was originally impeachable. I am not satisfied that the true motive for the execution of the deed was not this, a desire on the part of the lady to give to her husband the debt which was due from her husband to the testator's estate. If that

* 543 * was the true motive of the deed, then I apprehend that the transaction may not have been impeachable, for I know of no law of this Court which prevents a married woman from giving to her husband property over which she has a power of appointment, assuming of course that there is no undue influence. If, however, it was represented to her, that under the will her share was chargeable with the debt which was due from her husband, it would be equally clear that the transaction could not for one moment stand between her and the trustee. But the very existence of the deed contradicts the theory that any such representation had been made. For what is the effect of the deed? — To throw the debt upon the share of the wife, assuming that by the will it had not already been thrown upon that share. I think that there is nothing to lead to the inference that this deed was in any degree founded upon any misrepresentation made by the trustee. There is a total absence of evidence as to any of the circumstances under which this deed was executed; and one view, which I think not immaterial to be considered, is, what the Court ought to do with a deed executed as far back as the year 1821, assuming that there was no collateral evidence bearing upon the circumstances under which that deed was executed. I think it impossible to say that this Court could act in such a case without further inquiry. But then the parties have allowed such a length of time to elapse that no further inquiry can be of service, as every party connected with the transaction is dead, and no further information can be obtained. That would be of itself a sufficient reason for supporting this decree. But another view is this: From the year 1823 down to the year 1861 this deed has been acted upon and dealt with. And, even putting out of consideration the positive acts of acquies-

* 544 cence, or confirmation rather, on the part of this lady,* was it or was it not her intention ever to disturb the deed? I have read her letters. I am satisfied upon those letters that she

never for one moment intended to disturb the deed ; and if she did not intend to disturb the deed, those who claim under her cannot interpose to disturb it. I think that this appeal is wholly groundless, and must be dismissed with costs.

PONSFORD v. HANKEY.

1861. March 19. Before the LORDS JUSTICES.

The plaintiff entered into an agreement with the principal defendant to sell to him certain leasehold property, in consideration of a debt due from the plaintiff to the defendant, with a stipulation giving to the plaintiff the right of repurchase on payment of a specified sum, with interest, on a specified day, or so much of the repurchase money as should then be "due and owing, after deducting the net proceeds of all sales (if any) which should be made in the mean time, including all moneys laid out in repairs or improvements." The agreement provided that time should be considered of the essence of the permission to repurchase, and that the same should under no circumstances be exercisable after the specified day, any rule of equity to the contrary notwithstanding. The bill, which was filed one day before the expiration of the time for repurchase, alleged that the principal defendant had sold portions of the property to an amount more than sufficient or very nearly sufficient to pay the amount of the repurchase money, but had only rendered insufficient and unsatisfactory accounts of his receipts, and refused to give any others. The bill also stated that another defendant (who was the solicitor to the principal defendant) claimed to be and was, under agreements, deeds, and assurances, the particulars whereof were unknown to the plaintiff, interested in the premises comprised in the agreement, and that this defendant alleged that he was, in fact, a necessary party to the suit. The prayer was for an account of the moneys received by the principal defendant on account of the sales, and of what was due to him in respect thereof, and that he might account for and set off against his debt the sums received by him, and that the plaintiff, who offered to pay the balance (if any), might be at liberty to repurchase, notwithstanding the expiration of the time. On appeal from an order overruling the demurrer of the principal defendant, and allowing that of the other:

Held, —

1. That a sufficient case was alleged for some relief against the principal defendant.
2. That there was a sufficient allegation of interest in the other defendant, and that consequently neither demurrer was sustainable.¹

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 321, 322.

THESE were two appeals from decisions of Vice-Chancellor STUART overruling the demurrer of one and allowing the demurrer of another defendant to the bill, which claimed the benefit of an agreement for the repurchase of certain hereditaments at or before a time which was prescribed for that purpose by the agreement, and which elapsed the day after the filing of the bill.

* 545 * The bill was filed by James Ponsford against two defendants named Hankey and Harrison.

It alleged that in and prior to the month of February, 1856, the plaintiff had at his own expense caused to be erected on the freehold and leasehold land therein mentioned valuable messuages and tenements; and that to enable him to make such expenditure he had from time to time borrowed large sums of money upon security of mortgages of the various portions of the property. That at the close of the year 1855, or in the early part of January, 1856, the defendant Hankey demanded from the plaintiff immediate payment of a sum of 25,000*l.* which he had advanced to a firm in which the plaintiff was a partner. That the plaintiff was unable at short notice, except at a ruinous sacrifice of his property, to meet the demand, and made various proposals for gradually liquidating or otherwise satisfying the claim; but that the defendant Hankey threatened to make the plaintiff a bankrupt in the event of the plaintiff failing at once to pay off the 25,000*l.* and interest, or to give a sufficient security for the same.

After stating negotiations and correspondence between the plaintiff and Hankey, the bill stated:—

(Paragraph 15.) That throughout the transactions which led to and resulted in the assignments by the plaintiff to the defendant Hankey of the premises mentioned in the bill, the defendant Harrison, who had for many years been the confidential solicitor of the plaintiff, acted also as solicitor of the defendant Hankey, and, being anxious to obtain and having in fact obtained for himself large pecuniary advantages and benefits by virtue of the arrangements between the plaintiff and the defendant Hankey, had

* 546 paid far greater * attention to the interests of the defendant Hankey than to those of the plaintiff.

That (paragraph 20) on the 9th February, 1856, the plaintiff attended at the office of the defendant Harrison, and required alterations to be made in the proposed agreement, but was in-

formed by Harrison that the agreement was already engrossed, as also were the various deeds, being the assignments of the several properties referred to in the agreement, and that the agreement must be executed as engrossed, and without any alterations ; or otherwise that the defendant Hankey would at once take proceedings against the plaintiff to enforce the immediate payment of his debt, which would probably be the cause of the utter ruin of the plaintiff.

That (paragraph 21) the plaintiff remonstrated, and at first declined to execute any of the documents, unless a clause was inserted in the agreement stipulating that, in the event of the plaintiff repurchasing the property, the defendant Hankey should only be entitled to the repayment of the principal sum of 25,000*l.* and interest at 5*l.* per cent per annum ; but that (paragraph 22) the defendant Harrison refused to alter the agreement, and that the plaintiff, under the pressure of his pecuniary difficulties, and being without any independent professional advice or assistance, eventually executed the agreement as engrossed, together with fifteen indentures, being assignments to Hankey of the various properties.

That (paragraph 23) none of these indentures were read over to the plaintiff or explained to him.

That (paragraph 24) the plaintiff protested against * the * 547 terms of the agreement, and the omission therefrom of the stipulation or clause before referred to.

The bill then (paragraph 25) set forth the terms of the agreement, which was dated the 9th February, 1856, and made between Hankey of the one part and the plaintiff of the other part, whereby it was expressed to be agreed, —

(1.) That the plaintiff, his executors or administrators, might, on the 25th December, 1860, or at any time prior thereto, on giving to Hankey, his executors, administrators, and assigns, three calendar month's previous notice of his or their intention so to do, by leaving such notice at the then or last known place of abode of Hankey, his executors, administrators, or assigns, repurchase the property comprised in the agreement, subject to the mortgages then affecting the same, upon payment to him or them of the sum of 25,829*l.* 2*s.* 4*d.*, together with interest thereon at

and after the rate of 5*l.* per cent per annum, as from the quarterly day of payment of rents in London next preceding such payment, in case the same should not be made on any of the said quarterly days of payment of rents, or of so much thereof as should be then due and owing (after deducting the net proceeds of all sales, if any, which should have been previously made by him or them, including all moneys laid out in repairs or improvements of the property), in pursuance of the power in that behalf therein-after contained; and that Hankey, his executors, administrators, and assigns, would thereupon and upon receiving the amount of the moneys aforesaid, at the costs and charges of the plaintiff, his executors or administrators, re-assign and reconvey to him or them, as he or they should direct, the said premises, or so much thereof as should not then have been previously disposed of,

* 548 for all the respective residue of the terms * of years therein, subject to the rents and covenants payable and to be performed in respect of the same respectively, and also subject to the mortgage debts and incumbrances charged thereon respectively, but freed and absolutely discharged from all claims and interests of Hankey, his executors, administrators, and assigns, in, to, out of, or upon the same property and premises, or any part or parts thereof respectively.

(2.) That time should be considered as of the essence of the aforesaid permission to repurchase, and that the right of repurchase should in no case and under no circumstances be exercisable after the 25th of December, 1860, any rule of law or equity to the contrary notwithstanding, and that the arrangement should not be considered as constituting a mortgage, but an absolute purchase by Hankey, with such limited right of repurchase, and that the same should not preclude or prevent Hankey, his executors, administrators, and assigns, from letting, selling, and otherwise managing and dealing with the said property, or from doing the repairs thereof, as he or they should think proper, and without being liable to consult with or take the opinion of the plaintiff, his executors or administrators, in anywise in relation thereto; and that, so long as the right of the plaintiff to repurchase should continue exercisable, Hankey, his executors administrators, and assigns, might retain possession of the premises, and receive the rents and profits thereof for his or their own absolute use and benefit; and that all such rents and profits up to the time of repur-

chase, or to the quarter day of payment preceding the same, should be the absolute property of Hankey, his executors, administrators, or assigns.

(3.) That so long as the aforesaid right to repurchase * should continue exercisable as aforesaid, Hankey, his * 549 executors, administrators, and assigns might sell all or any part or parts of the premises, on such terms generally as he or they should think proper, and without being accountable to or under any liability to consult with the plaintiff, his executors, or administrators thereon; and that the consideration moneys for each such sale or sales after payment of the mortgage debt or debts charged upon the property sold, or a proportionate part thereof, in the event of its not including the whole of the property comprised in such mortgage or mortgages, and all the incidental expenses, and the amount of all moneys laid out and expended by Hankey, his executors, administrators, and assigns, for repairs and improvements of the property as aforesaid, should be paid over to Hankey, his executors, administrators, or assigns, for his or their own use and benefit, but yet so that after the receipt thereof the aforesaid right of repurchase should be exercisable in respect of the property for the time being remaining unsold, on payment by the plaintiff, his executors, or administrators, to Hankey, his executors, administrators, or assigns, of such a sum of money as together with the net amount so received should make up the aforesaid sum of 25,829*l.* 2*s.* 4*d.*, and on the observance by him or them of the other terms and stipulations which on his or their part ought to be observed in order to entitle him or them to repurchase the premises according to the spirit and intention of the provision in that behalf.

(4.) That if any of the incumbrances specified in the schedule to the agreement should be paid off while the right to repurchase continued, the person or persons by whom the same should be paid off (whether it should be Hankey, his executors, administrators, or assigns, or the plaintiff, his executors or administrators), * should be considered as standing in the place of the incum- * 550 brancer whose incumbrance should be paid off.

(5.) That Hankey, his executors or administrators, would, whenever thereunto required by the plaintiff, his executors or administrators, release and assign to the plaintiff, his executors, or administrators, or otherwise as he or they should direct, the aforesaid debt of 25,000*l.*; and that all deeds and instruments necessary for

effectuating the above-mentioned purposes should be made and entered into by the parties aforesaid, and should be prepared and executed at the plaintiff's expense.

The bill further stated (paragraph 27) that the plaintiff executed the above agreement under the above-mentioned protest, and never waived or abandoned his right to receive from Hankey, a full and true account of all the moneys received by Hankey either in respect of the rents, issues, and proceeds of the premises, or from the sales thereof.

The bill further stated (paragraph 29) that Hankey had since the date of the said agreement sold a large portion of the property comprised therein, and received the purchase-moneys thereof, and (paragraph 30) that the total amounts which had been received by Hankey, or by Harrison on his behalf, in respect of such sales, and in respect of the rents and profits of the property, amounted to a very large sum in the whole, being in fact more than or very nearly sufficient to pay, discharge, and satisfy the whole of the principal sum of 25,000*l.* with interest thereon, or on the unpaid part thereof, for the time being, at the rate of 5*l.* per cent per annum, from the date of the agreement, together with all costs, charges, and expenses which Hankey had incurred, or been put to

* 551 in or about the sales of the said *hereditaments, and the collection of the rents, issues, and profits thereof, and all payments and outgoings in respect thereof.

The bill also stated (paragraph 31) that on the 22d of September, 1860, the plaintiff, in pursuance of the agreement, sent to Hankey a notice in writing, which was set out in the bill, claiming his right of repurchase, and requiring Hankey to reassign the property, as the plaintiff intended to complete the repurchase on or before the 25th of December then next, and also demanding from Hankey a statement of the rents and profits received by him for each respective property, house, and premises, together with all the interest moneys, income-tax, and ground-rents, which he had paid in respect of such property.

The bill further stated that the plaintiff, being unable to obtain from the defendants, or either of them, any detailed or proper account, or, indeed, any account whatever, of the moneys received by Hankey or by Harrison on his behalf since the date of the agreement, was wholly unable to ascertain the exact amount, if any, due

to Hankey, upon the footing of the agreement (as modified by the previous understanding) which was come to between the plaintiff and the defendant Hankey, and which was never waived or abandoned by the plaintiff; and that the plaintiff by reason of the matters aforesaid did, on the 22d of December, 1860, leave at the residence of Hankey, and also serve on Harrison, a further notice requiring Hankey to furnish to the plaintiff an account of the rents received since the date of the agreement and of the proceeds of such parts of the property as had been sold since the date of the agreement, and adding that if Hankey declined to furnish the accounts first referred to, yet * that the plaintiff required him to fur- * 552 nish the account secondly referred to. And the plaintiff further stated by this notice that he was ready and willing and thereby offered to pay to Hankey on the 24th December instant at three o'clock in the afternoon such a sum of money as might be justly due and owing to him in respect of principal and interest, and as, according to the true construction of the agreement and the understanding of the parties thereto at the time of the execution thereof, was stipulated and agreed to be paid as the consideration for the repurchase.

The bill then stated (paragraph 37) that, in consequence of such last-mentioned notice, Harrison sent on behalf of Hankey to the plaintiff's solicitors on the 24th December, 1860, a short statement, purporting to be an account of the sales made by Hankey; but that such account was insufficient and unsatisfactory and did not contain a true and just account of the sales made by Hankey, or of the sums received in respect thereof, and did not show the balance which, having regard to the sales made by Hankey, would be really due from the plaintiff to Hankey.

The bill stated (paragraph 38) that the above account was only furnished to the plaintiff's solicitors on the morning of the 24th December, 1860, and that no sufficient time had been given to the plaintiff, or his solicitors on his behalf, to examine minutely the items of the account; and (paragraph 39) that, notwithstanding urgent applications which were made by the plaintiff for further accounts, both the defendants refused to furnish the same, or to furnish any accounts whatever of or in relation to the dealings and transactions of the defendants, or either of them, with the messuages, tenements, and hereditaments comprised in the schedule * to the agreement, other than the insufficient and * 553 unsatisfactory account so rendered as aforesaid.

With regard to the defendant Harrison, the bill stated (paragraph 41) that he, under and by virtue of divers agreements, deeds, and assurances, the particulars of which were wholly unknown to the plaintiff, and under and by virtue of some verbal understanding and agreement with the defendant Hankey, the particulars of which verbal agreement were also wholly unknown to the plaintiff, claimed to be and was interested in the said messuages, lands, tenements, and hereditaments, and that he alleged that he was in fact a necessary party to the suit.

The bill prayed : —

(1.) That it might be declared that under the circumstances in the bill stated the plaintiff, was entitled, as against the defendant Hankey, and all persons claiming by, from, through, or under him, to the full benefit and advantage of the several clauses and stipulations in the articles of agreement of the 9th February, 1856, contained for the repurchase by the plaintiff of the several messuages, tenements, and hereditaments in the schedule to the articles of agreement mentioned or referred to, or the unsold portions respectively, notwithstanding that such repurchase should not be completed on or before the 25th December, 1860.

(2.) That an account might be taken of what since the date of the articles of agreement had been received by the defendant Hankey, or by any other person or persons by his order or for his use, in respect of the rents, issues, and profits of the several
* 554 messuages, * tenements, and hereditaments comprised in the schedule to the articles of agreement.

(3.) That it might be ascertained which of the messuages, tenements, and hereditaments comprised in the schedule to the articles of agreement had been sold, and when and to whom and under what circumstances; and that an account might be taken of what was or were the gross purchase-money or purchase-moneys paid for such of the said messuages, tenements, and hereditaments as had been sold.

(4.) That an account might also be taken of what (if any thing) was justly due and owing to the defendant Hankey for principal and interest on his debt; and that in taking such last-mentioned account the defendant Hankey might be directed to account for and set off from his debt and interest all moneys received by him or by any person or persons by his order or for

his use in respect of the rents, issues, and profits of the hereditaments, or the unsold portions thereof for the time being, and in respect of the gross proceeds of the sales of such of the hereditaments as had been sold as aforesaid, or so much and such of the moneys as to the Court, under the circumstances therein stated, might appear just and equitable, the plaintiff being ready and willing and thereby offering to pay to the defendant Hankey what (if any thing) should, upon the taking of such lastly-mentioned account, be found to be due to him, together with interest thereon in the mean time.

(5.) That it might be declared that the plaintiff was entitled to repurchase the hereditaments or the unsold portions thereof respectively; and that the defendant Hankey and all necessary and proper parties might, on * payment of what (if * 555 any thing) might be found due to him, or forthwith if nothing should be so found due, be ordered and decreed to execute to the plaintiff, or as he might direct, proper assignments and assurances.

(6.) For an injunction to restrain the defendants from selling or otherwise dealing with such of the hereditaments as remained unsold, and from receiving the rents and profits. The bill also prayed for a receiver and general relief.

Each of the defendants demurred for want of equity. The Vice-Chancellor overruled the demurrer of the defendant, Hankey, with costs, but allowed, with costs, that of the defendant Harrison. The case is reported in the second volume of Mr. Giffard's reports. (a)

The defendant Hankey and the plaintiff both appealed.

Mr. Bacon and *Mr. Cotton*, in support of the appeal of the defendant Hankey. — Although the bill states that the agreement was signed without advice, it does not seek to rescind or alter or reform it. The agreement must consequently be taken to be valid; and so taken it excludes entirely the relief sought by the bill, which does not even state that any tender has been made to Mr. Hankey.

They referred to *Joy v. Birch*. (b)

(a) Page 604.

(b) 4 Cl. & Fin. 57; 10 Bligh N. S. 201.

Mr. Malins and *Mr. Bristowe*, for the plaintiff, were not called upon with reference to this appeal. — On the plaintiff's own
 * 556 appeal, they submitted that there was a * sufficient statement in the bill of interest in the defendant Harrison, to make him a proper party to the suit.

Mr. Elmsley and *Mr. Jessel*, for the defendant Harrison. — There is no equity appearing on the bill against Harrison. Mere general allegations, like those contained in the 41st paragraph, are not enough to protect the bill from a demurrer. The allegation is that he is interested in the property, not in the matters in question, in the suit. *Plumbe v. Plume*. (a) As to the account which is alleged to have been refused, the agreement would have provided for an account being rendered, if that had been intended.

They referred to *Davis v. Thomas*, (b) *Pegg v. Wisden*, (c) *Le Texier v. The Margravine of Anspach*. (d)

THE LORD JUSTICE KNIGHT BRUCE. — Of course for the present purpose, though alone for the present purpose, every allegation in the bill must be taken to be a true and real fact not displaced, countervailed, or weakened by any possible fact not stated in the bill.¹ So dealing with the matter, I conceive it to be clear that, as far as the defendant, *Mr. Hankey* is concerned, the 15th, 20th, 21st, 23d, 24th, 31st, 36th, 37th, 38th, and 39th paragraphs of the bill are decisive against the demurrer, as showing that, established and unanswered, they would entitle the plaintiff to some decree against the defendant. I am also of opinion that the 41st
 * 557 paragraph shows *Mr. Harrison* to be a * proper party to the bill. I therefore think that both demurrers fail.

THE LORD JUSTICE TURNER. — I am of the same opinion. The whole substance of the agreement was that the defendant *Mr. Hankey* was to have the estate until payment, within a certain limited time, of the amount which should be due to him. The terms of the agreement are, that there should be a repurchase, upon payment of the sum of 26,000*l.* and odd and interest, deduct-

(a) 4 Y. & C. 845.

(c) 16 Beav. 239.

(b) 1 R. & M. 506.

(d) 15 Ves. 159.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 544.

ing the net proceeds of all the sales (if any) which should have been previously made by Mr. Hankey, including all moneys laid out in repairs or improvements of the property. Now I think that that clause in the agreement throws upon Mr. Hankey the obligation of rendering an account, because the amount which is to be paid to him, and which is the consideration of the repurchase, depends on the amount which he has already received by means of the sales of the property. It was argued that there would have been provision made in the agreement expressly, if it had been so intended, that Mr. Hankey should render an account. But the agreement does contain an express clause, that all deeds and instruments shall be executed which shall be necessary for effectuating the several purposes of it. And if, therefore, it was one of the purposes of the agreement that the amount due to Mr. Hankey should be ascertained, there would then be a right to have a deed prepared which should contain the provisions which might be necessary for effectuating the agreement in that respect. However, in the absence of those provisions, we find these facts stated on this bill, and admitted for the purposes of the demurrer: that Mr. Hankey did render an account, which account was *not a true and correct account, of the sums which were *558 due to him, and does not show the balance which, having regard to the sales, would be really due from the plaintiff to the defendant Hankey. And there is not only this allegation, but an allegation that Mr. Hankey does refuse to furnish any further accounts, or any accounts whatever, of or in relation to the dealings and transactions of the defendants or either of them with the estate.

And another allegation is that the account of the sales so already rendered by the defendant Hankey is wholly insufficient and unsatisfactory, and is, in material entries therein, erroneous and incorrect.

We are bound on this demurrer to assume all those facts to be true; and if they be true I cannot doubt that, whatever the right decree may be to be made, some decree must undoubtedly be made in favour of the plaintiff at the hearing of this cause. Suppose it to be the case that Mr. Hankey has sold property to an amount more than sufficient to pay the amount due to him. In that case, although he may be entitled to retain the property which is the subject of the agreement for the purchase as an absolute purchaser, I apprehend

that, independently of any question of purchase or repurchase, there may be a right to have an account taken in order to have the amount overpaid refunded. It seems to me, therefore, that the demurrer of Mr. Hankey cannot be sustained.

Then, as to the demurrer of Mr. Harrison, I am afraid I differ from the opinion of the Vice-Chancellor. I confess it does appear to me that the allegations of this bill are sufficient as to there being an interest in Mr. Harrison in the matters in question in this suit. Mr. Jessel so insists, because there is this allegation, "that * he is interested in the messuages and premises." If the allegation had stopped there, it might perhaps not have amounted to an allegation that the defendant had an interest in the matters in question in the suit; but it goes on to state, "that he alleges that he is a necessary party to the suit." This I think cannot be construed as a separate and distinct allegation, but must be taken with reference to the interest in the messuages and premises which are before alleged to be vested in him. My opinion, therefore, is, that both these demurrers must be overruled.

THE WARDEN AND ASSISTANTS OF THE HARBOUR OF DOVER *v.* THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

1861. March 9, 11, 18, 22. Before the LORDS JUSTICES.

Where a special railway Act provided that the line should be made according to the levels shown on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street: *Held*, that the latter provision was not obligatory, and did not prevent the company from carrying their line across the street according to the provisions of the general Act.¹

THIS was the appeal of defendants from an order of Vice-Chancellor STUART granting an interlocutory injunction to restrain them from crossing a street in Dover in any other manner than was authorized by the defendants' special Act of incorporation.

¹ See Kerr Inj. 623; 2 Dan. Ch. Pr. (4th Am. ed.) 1640; 2 Joyce Inj. 816, 817.

The plaintiffs, who were incorporated in 1606, by a charter, were entitled, among other property, to four houses in Limekiln Street, in the town of Dover.

By the East Kent Railway (extension to Dover) Act, 1855, with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, * 1845, were incor- * 560 porated, the East Kent Railway Company (whose name had since been changed to "The London, Chatham, and Dover Railway Company") were empowered to make and maintain a railway as therein mentioned, it was enacted (sect. 6), that, subject to the provisions of the special Act, the railways thereby authorized should be made in the line and according to the levels delineated on the plans and described in the books of reference, and that the company might enter upon and take and use such of those lands as they thought necessary for the purposes of their Act. And it was further enacted (sect. 7), that, subject to the provisions in the Railways Clauses Consolidation Act, 1845, contained in reference to the crossing of roads on a level, it should be lawful for the company in constructing the railway to carry the same on a level across the street in question: provided always, that the company should erect and forever maintain a good and sufficient public foot-bridge for the use of foot-passengers over the road at or near the point of such level crossing.

On the 13th of September, 1860, an agreement was entered into between the plaintiffs and the defendants, whereby the plaintiffs agreed to sell and the company to purchase the hereditaments specified in the schedule to the agreement for 17,262*l*. (which was to include compensation for all damage occasioned by the severance from or from otherwise injuriously affecting the plaintiffs' other property, and for all accommodation works required by the Acts).

And the defendants thereby agreed, fifthly, within three calendar months after demand, to pay to the plaintiff for any injury or damage which might happen to the estate of the plaintiffs or any part thereof, by reason of the defendants stopping up any street or thoroughfare, * or altering the level of any street * 561 or thoroughfare, in Dover, in constructing their railway or any of the buildings or works connected therewith, such a sum as should be determined by the surveyors for the time being of the

plaintiffs and defendants or an umpire to be appointed as therein mentioned.

The bill stated that the defendants intended to carry their railway across Limekiln Street, not on a level, but a depth more than two feet below it, and for that purpose to divert the street, raise the road and carry it across the line by a bridge. The bill stated that the raising of the road would be productive of great injury to the plaintiffs' property, particularly to the part of it in Limekiln Street, and more especially to the four houses. The prayer was for an injunction to restrain the defendants from raising or diverting Limekiln Street in the manner delineated upon the plans furnished by them to the plaintiffs, and from raising or diverting the same in any manner which was an injury to or should be or operate to the injury of the four houses and other property of the plaintiffs to the north-east of Trinity Church or any other property of the plaintiffs in the town of Dover, and from making and constructing the railway over or across Limekiln Street on any other level or any other manner than as required and authorized by the East Kent Railway (extension to Dover) Act, 1855, and the public Acts incorporated therewith, and from making or constructing any road over and across the piece of land in the deposited plans described as numbered 16.

On the 7th March, the order under appeal was made restraining the defendants from constructing their railway
* 562 * over or across Limekiln Street on any other level or in any other manner than as required and authorized by the 7th section of the East Kent Railway (Extension to Dover) Act, 1855.

Mr. Malins and *Mr. Cotton*, for the appellants. — In the first place, the 7th section is, according to the true construction of the Act, permissive and not compulsory. The Vice-Chancellor thought that the section constituted a parliamentary contract on the part of the defendants to construct the line here upon the level. But there is nothing to show that the special Act was intended to abridge the powers conferred on the defendants by the general Act. On the contrary, the intention was to add to those powers, by giving them the option of constructing the line upon the level, if they thought fit. But even if this were not clear, the plaintiffs

have not made out such a case of damage as to entitle them to an interlocutory injunction, and have, moreover, acquiesced too long to obtain one.

They referred to *Holyoake v. The Shrewsbury and Birmingham Railway Company*, (a) *Regina v. Sharpe*, (b) *North British Railway Company v. Todd*, (c) *Rigby v. The Great Western Railway Company*. (d)

Mr. Bacon and *Mr. Renshaw*, for the respondents. — The 7th section of the Act must be read in connection with the 6th, which provides that the railway shall be constructed according to the deposited plans and sections. According to these, the plaintiffs' property would * not be damaged, as the railway * 563 would be carried on the level, and all interference with the plaintiffs' houses avoided. The company cannot alter the *datum* line of their railway. The Court will keep the company within its powers, although the damage arising from their being exceeded may not be irremediable. No case of acquiescence is made out.

They referred to *Webb v. The Manchester and Leeds Railway Company*, (e) *Ware v. The Regent's Canal Company*, (g) *The Attorney-General v. The Great Northern Railway Company*, (h) *The Imperial Gas Light and Coke Company v. Broadbent*, (i) *The North British Railway Company v. Tod*. (c)

Mr. Malins, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — In this surprising, or to me, at least, surprising suit, we have to dispose of an interlocutory motion, to the plaintiffs' success in which it seems necessary that they should show a probability, if not establish, that the phrase "it shall be lawful," contained in the 7th section of the defendants' Act of Parliament, passed in July, 1855, ought to be construed as used in an obligatory and mandatory sense. As I read that section, however, considered, as it must be, in conjunction with the

(a) 5 Railw. Cas. 421, 427.

(b) 3 Railw. Cas. 33.

(c) 4 Railw. Cas. 449.

(d) 2 Ph. 48.

(e) 4 Myl. & Cr. 116.

(g) 3 De G. & J. 211.

(h) 4 De G. & S. 75.

(i) 7 H. L. Cas. 610.

other sections of the Act, the four words that I have mentioned are permissive merely and not mandatory. But the Attorney-General is not before us, and even if the words are mandatory, I think the plaintiffs barred by lapse of time and conduct from

* 564 any title to obtain an interlocutory * injunction for the purpose for which they have obtained the order before us.

THE LORD JUSTICE TURNER. — The injunction, which is the subject of this appeal, restrains the defendants from making and constructing their railway over or across Limekiln Street, Dover, on any other level or in any other manner than is required and authorized by the East Kent Railway (Extension to Dover) Act, 1855, and the public Acts incorporated therewith, until further order. I must observe, in the first place, that this appears to me a most inconvenient form of injunction. There is no declaration; no statement of what, in the opinion of the Court, is the right mode in which this railway should be constructed, and the consequence of the injunction being in that form is, that no possible alteration can be made by the railway company in the mode of constructing the railway, without exposing themselves to the danger of commitment for a breach of the injunction. The defendants are left perfectly at large to judge what, on the part of the defendants, may be the mode of constructing the railway which is required and authorized by the special Act and the public Acts incorporated therewith. I make that observation because I think that the injunction is in a form which, so far as I am aware, I have never seen adopted before, and which I think is likely, if generally followed, to lead to inconvenient consequences.

It must be assumed, however, that the principle on which this injunction was granted is, that the defendants are constructing the railway in a mode which is not required and is not authorized by their special Act or by the public Acts which are incorporated therewith, * and the appeal must be dealt with upon that assumption. Now the mode in which the defendants are constructing their railway is, as I understand, this — they are carrying their railway across Limekiln Street so that the line of the railway is below the line of the street. That is one objection. Another objection is, that the defendants are diverting Limekiln Street, and carrying it over the railway by a bridge; and it is said, that great injury will be occasioned to the plaintiffs by this mode

of constructing the railway, with respect to four houses in Limekiln Street which belong to them. These are the proceedings against which this injunction is granted.

I think it may be well to consider the two points separately.

First, with respect to crossing on a level, I cannot find in this bill, after very carefully reading it more than once, any allegation of damage to the plaintiffs in respect of their houses by the company not crossing Limekiln Street at a level, other than the damage which may be said to be occasioned by the raising of the road and the erection of the bridge. The frame of the bill is peculiar in that respect. The 12th paragraph is to this effect: "By the Railways Clauses Consolidation Act, 1845, it is provided, that the limit of deviation in the level of a railway passing through a town, village, street, or land continuously built shall be two feet." And the 13th paragraph is this: "The plaintiffs have lately discovered, and the fact is, that the defendants, the company, intend to construct and are about constructing their railway across Limekiln Street, not on the level authorized and required by the East Kent Railway (Extension to Dover) Act, 1855, but at a much lower level than two feet below the level authorized and

* required by the same Act, and so that such railway shall * 566 pass under, and not a level with, Limekiln Street; and, in order to enable the defendants, the company, so to do, they propose and intend to divert Limekiln Street in a north-westerly direction, and to raise the road so diverted in a sloping direction to the top of the bridge by which such road, if so diverted, would be carried over or across the said railway." Then the bill goes on thus: The raising of the said road in the manner intended by the defendants, the company, will be productive of great injury to the plaintiffs' property, particularly to such part as is situate in Limekiln Street aforesaid, and more especially to the four houses next hereinafter mentioned. Then it goes on to describe the particular injury which will be done to these four houses by reason of the road being diverted and carried across the railway by the bridge. But, independently of carrying the road by a bridge across the railway, I cannot find in this bill an allegation that any damage whatever will be done to the plaintiffs' property by the road not being carried across Limekiln Street on the level which is described in the Act of Parliament. I think it very possible that the plaintiffs are right in having taken that view of the case, for in looking

at the agreement entered into between the plaintiffs and the defendants for the sale of the property which was sold to them in the month of September, 1860, for 17,262*l.*, I find this clause — I do not say that it does refer, but I rather suspect that it was intended to refer, to this very subject: [His Lordship read the clause, to the effect set out above.] Now it is quite true the expression is, “or altering the level of any street or thoroughfare in Dover,” but it is an alteration within the meaning of those words, as I under-

stand them, if the alteration made in the level of the street * 567 where the railway crosses it lowers the street by six or * seven feet; and I do not see why the damage to be done in this way was not intended to be provided for by this agreement. It may or may not be so. But supposing it to be otherwise, there is no case for the injunction. It would then be a public wrong of which the Attorney-General would be the person to complain. That observation is an answer to the argument which was addressed to us on the part of the plaintiffs, with reference to the imperative nature of the 6th section, that the railway ought to be made according to the plans, and on the levels delineated on the plans and sections. The lowering of the level of the railway might be a matter of which the Attorney-General could complain, but not the plaintiffs, in the absence of any allegation of any private injury to them.¹

Then, with regard to the question of carrying the road over the railway by a bridge, that is a question which depends upon the operation of the 7th section of the special Act, and the Court has to consider whether it is so perfectly clear that the 7th section is imperative and not permissive, that the Court ought to interfere at once by injunction. For if the Court is satisfied that there is a reasonable doubt upon that subject, and still more if the Court has reason for considering that the doubt is more likely to be solved in favour of the defendants than in favour of the plaintiffs, the case resolves itself then into a question of comparative injury to one side or the other, by granting or withholding the injunction. Now the terms of the 7th section are these: That, subject to the provisions in the Railways Clauses Consolidation Act contained in

¹ See *Bigelow v. The Hartford Bridge Co.*, 14 Conn. 565; *Milhan v. Sharp*, 28 Barb. 228; *Cook v. Bath, L. R.* 6 Eq. 177; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; 2 Dan. Ch. Pr. (4th Am. ed.) 1636, 1637; *Kerr Inj.* 333, 334; 1 *Joyce Inj.* 190.

reference to the crossing of roads on a level, it shall be lawful for the company, in constructing the railway, to carry the same on the level across the road, with a proviso that the company shall erect and for ever maintain a good and sufficient public *foot-bridge for the use of foot-passengers over the said * 568 road at or near the point of such level crossing. Nor is it to be forgotten, that the Railways Clauses Consolidation Act, 1845, is incorporated with the special Act. By the 46th section of the Railways Clauses Consolidation Act, 1845, no company is entitled, unless it is otherwise provided by the special Act, to carry a railway across a street upon a level. They are, by the general Act, bound to make bridges. Then, the general Act having placed companies in this position, how is the 7th section of the special Act to be read? Is it to be read as an imperative clause, or is it to be read as a discretionary clause giving permissive power? It appears to me reasonably plain, that the meaning of the legislature here was this: that whereas by the 46th section of the Railways Clauses Consolidation Act, 1845, it is enacted, that no railway shall be carried across a street on a level; now therefore be it enacted, that, subject to the provisions in that Act contained, that is to say, the provisions with reference to the crossing of roads on a level, it shall be lawful for the company to carry the line in this instance on a level across the road. That appears to me to be a reasonable, sensible, and sound construction of the Act, and I think that there has been an error in construing the clause as rendering it compulsory on the railway company to cross the road upon a level.

It was said in argument, that this might be very true if the case rested on the 7th section alone, but that the 7th section must be taken with the 6th section. The 6th section, however, only says that the railway shall be made in the line and according to the levels delineated upon the plans and upon the lands delineated on those plans and described in the books of reference, leaving the mode in which the railway is to be made to *be regu- * 569 lated by the general Act and by the special Act. Therefore the argument, that the 6th section must be read as controlling the operation of the 7th section, wholly drops to the ground. Then, how does the case stand if the 7th section is permissive and not compulsory? The consequence is that it falls within the 46th section of the general Act, by the terms of which the company, in

the event of their not exercising the discretionary power to cross the road on a level, are compelled to carry the road across the railway by a bridge.

But it is said that this will do great injury to the plaintiffs, and that the backs or fronts of their houses or some of them will be blocked up by the rise of the road as it passes up to the bridge across the railway. But the plaintiffs are not without remedy in that respect. The Lands Clauses Consolidation Act, which is incorporated in the special Act, expressly provides compensation for those whose property is injured or injuriously affected by the mode in which the works of railways are executed.¹ If this Court were to interfere by injunction simply on the ground of damage and injury done to the plaintiffs, no railway in the kingdom could be made, because it is impossible that any railway can be made without some damage or injury being done to the property of some of the persons through whose lands it passes.

And with respect to the question of comparative injury, there is on the one side a railway expected to be opened in May, with its works all laid out for the purpose of carrying its railway below the level across Limekiln Street nearly completed, and on the other side there is, to say the most of it, a doubtful right on the part of the plaintiffs to compel the company to make the railway * 570 upon the level of the street, instead of crossing it * by a bridge. There is therefore really no question as to the result of the comparison.

Independently therefore of the questions of acquiescence and conduct, I am satisfied that this Court would do great injustice by maintaining this injunction. It must be therefore dissolved.

¹ See *The London & North-Western Railway Co. v. Smith*, 1 Mac. & G. 216, and note (2), and cases cited; *East and West India Docks, &c. v. Gattke*, 8 Mac. & G. 155, and note (1).

BROADBENT v. BARLOW.

1861. March 6, 9, 23. Before the Lord Chancellor Lord CAMPBELL.

The plaintiffs, who were cotton-spinners, employed a commission agent to sell their goods, and the course of business was for the agent to obtain the assent of the plaintiffs to each sale. The agent transmitted to the plaintiffs the particulars of certain sales which he represented as having been made to specified purchasers, and afterwards rendered accounts debiting himself with the purchase-moneys, but not paying the balance. He afterwards executed an assignment for the benefit of his creditors, when it appeared that his representations as to his disposal of the goods were untrue, and that he had in fact consigned the goods for sale as and with goods of his own to factors in India, and that the account had been settled between him and the factors on the footing of debiting each cargo only with the advances and charges made in respect of that cargo, but that on the whole account there was a balance coming from the factors: *Held*, —

1. That the plaintiffs were entitled to have the proceeds marshalled, and the advances and charges thrown entirely on the agent's own goods.¹
2. That this right was not excluded by the settlement of accounts between the plaintiffs and the agent, or by the former having had upon the agent's books the means of discovering the fraud before a meeting took place of his creditors, at which the plaintiffs attended, and at which the deed of assignment was agreed to, but at which neither the fraud, nor the claim founded on it, was brought forward, the principle being that "Means of knowledge" to affect a person with constructive notice must be such as a prudent man might be expected to avail himself of.²
3. That the right was not excluded by the mode in which the factors had rendered their accounts to the agent, nor by their not having themselves set up any claim to marshal the proceeds of the consignments.
4. That the enforcement of this right did not preclude the plaintiffs from proving under the deed of assignment for the deficiency.

THIS was the appeal of the defendants from an order of Vice-Chancellor Wood, made on motion for a decree, and declaring the plaintiffs entitled to a sum which had been deposited to abide the decision of the Court on a question of lien and marshalling.

The plaintiffs were cotton-spinners at Oldham, and * the * 571 defendants were trustees under an assignment for benefit of creditors of a commission agent named George Hodgkin, since deceased, who had been employed by the plaintiffs to make sales for them.

¹ See *Ex parte Alston*, L. R. 4 Ch. Ap. 168.

² See *Post*, 581, note (1).

In and prior to the month of October, 1855, the plaintiffs had been in the habit of employing Hodgkin as their commission agent in effecting sales of cotton yarn, cotton cloth, and other goods on their account. The usual course of business in effecting such sales had been, for the names of proposed purchasers and the terms of each proposed contract to be submitted to the plaintiffs for approval, and, upon such approval being given, for Hodgkin, to enter into such contracts and to send advice notes thereof to the plaintiffs, containing all the particulars as to price and other terms of sale, and thereupon for Hodgkin to deliver to the purchasers the plaintiffs' goods so contracted to be sold; the invoices being made out in the name of Hodgkin, and he receiving the purchase-moneys in trust for the plaintiffs, subject to his agency charges, but the sales being entirely at the plaintiffs' risk.

On the 31st of October, 1855, the plaintiffs received from Hodgkin a telegraphic message that Messrs. Burt & Whalley, of Manchester, were willing to purchase certain specified cotton cloths at specified prices. The plaintiffs assented to the proposal, and authorized Hodgkin to enter into a contract on the proposed terms. On the 7th January, 1856, the plaintiffs received from Hodgkin another telegraphic message to the effect that Messrs. Burt & Whalley offered to purchase 6000 pieces of cotton cloth for a specified price. This contract was also approved by the plaintiffs, who transmitted to Hodgkin pieces of cotton cloth of the required * 572 description sufficient to make up, with what Hodgkin * had in his hands belonging to the plaintiffs, the required quantity.

In the months of December, 1855, and February, 1856, Hodgkin sent in to the plaintiffs his accounts, in which he represented the sales as having been made by him on the plaintiffs' behalf, and debited himself with the purchase-moneys. The balance appearing due to the plaintiffs on these accounts was 2884*l.* 16*s.* 6*d.*, from which sum Hodgkin claimed to deduct charges amounting to 36*l.* 13*s.* 6*d.* Hodgkin made a payment to the plaintiffs on account of the balance appearing due on the accounts, but the payment was insufficient to discharge this balance, independently of other transactions in question.

In April, 1856, Hodgkin made an assignment of his estate and effects to the defendants, for the benefit of his creditors. In the latter part of April, 1856, the plaintiffs, for the first time, discovered that Hodgkin did not in fact dispose of the cloth by selling it

to Messrs. Burt & Whalley, but had, without the authority, sanction, knowledge, or privity of the plaintiffs, consigned the goods to Messrs. Rennie, Clowes, & Co., of Bombay, as his factors or agents, in order that they might sell the same on his account. The bill stated that Rennie, Clowes, & Co. represented, and that the fact was, that they sold the goods on behalf of Hodgkin, and without notice that the same were the plaintiffs' property, and that they admitted that the sum which they had received for the goods in question was 1464*l.* 1*s.*; that they had goods frequently consigned to them by Hodgkin on his own account, upon the security of which they had made advances to him, and that there was a general account between them, in which he was credited with the proceeds of the consignments and debited with the *advances *573 and agency charges, and that at the date of the assignment there was due from them to Hodgkin a balance of 810*l.* 7*s.* 11*d.*

On the 23d July, 1856, Hodgkin died insolvent. By an arrangement between the plaintiffs and defendants the balance due from Messrs. Rennie, Clowes, & Co. was received by the trustee of the deed of assignment, without prejudice to the rights of the plaintiffs, and to abide the decision of the question between the parties.

The bill prayed that it might be declared, that the plaintiffs were entitled to receive the sum of 810*l.* 7*s.* 11*d.*, or, if necessary, to have the advances and charges which were due from Hodgkin to Messrs. Rennie, Clowes, & Co. and the proceeds of the consignments made to them by Hodgkin marshalled; and to have the proceeds of the consignments other than the plaintiffs' said goods applied in the first place in discharge of the advances and charges, in case of the proceeds of the said last-mentioned goods.

The case alleged by defendants in their answer was, that, on the 7th of January, 1856, Hodgkin had in stock at his warehouse in Manchester 5915 pieces of cotton cloth, manufactured by the plaintiffs and belonging to them, of the description mentioned in his letter and advice note; and that, on the 7th of January, 1856, he wrote and sent to the plaintiffs the following letter (in which were inclosed the monthly account between himself and the plaintiffs for the previous month of December, and also the advice note) :—

!

"January 7, 1856.

"Gentlemen,—Herewith I have the pleasure to hand you ac-

*574 count for December; also * advice of sale of 6000 pieces 27 in. T cloth, 6lbs. 0oz. at 4s. 8d., towards which I have delivered 5915 pieces."

The advice note was as follows:—

"721.

53, Moseley Street, Manchester,
"January 7, 1856.

"Sold on account of Messrs. Mary Broadbent & Son, by George Hodgkin, 6000 pieces 27 in. T cloth, 6lbs. 0oz. at 4s. 8d.; 5915 pieces of the above from stock."

That, on the 7th day of January, 1856, Hodgkin debited himself, in his account with the plaintiffs, with 1400*l.* as the price of the afore-said 6000 pieces of cloth, which was the full price or value of them at the then current or ruling price of such cloth in the Manchester market.

That Hodgkin took to his own account the 5915 pieces of cloth, in the letter of the 7th January, 1856, and the advice note mentioned; and that within a few days afterwards he also took to his own account, out of a further stock of cloth subsequently consigned to him by the plaintiffs, the eighty-five pieces mentioned in the letter and advice note.

That, in the months of February and March, 1856, Hodgkin, in the usual course of business, came to an account with the plaintiffs, in respect of his dealings on their account up to those respective times; and that the names of Messrs. Burt & Whalley did not occur in those accounts; and that there occurred in the accounts the following entry to credit of the account on the 7th of January, 1866, of "By goods, 1400*l.*"

That, on the 4th of March, 1856, Hodgkin delivered to *575 * the plaintiffs a sum of 1500*l.* in cash, and a check for 1473*l.* 13*s.* 6*d.*, making together 2973*l.* 13*s.* 6*d.*, of which total sum 149*l.* 8*s.* 6*d.* was on account of transactions other than those which were in question in the suit, but that the residue, amounting to 2824*l.* 5*s.*, was due in respect of such transactions.

That the check was dishonoured, and that afterwards, but before Hodgkin suspended payment, or, at all events, before the date and execution of his trust-deed, the plaintiffs obtained from him moneys and securities to a large amount in the whole, in liquidation, wholly

or in a great degree, of the last-mentioned balance, or of the unpaid part thereof, and particularly of the dishonoured check.

That, upon reference to the accounts, correspondence and documents between the plaintiffs and Hodgkin, it would appear that the transactions in reference to the 6000 pieces of cloth were conducted in a manner more consistent with the supposition of the goods having been taken to account by Hodgkin at the price mentioned than of their having been sold to Messrs. Burt & Whalley at that price, and that the circumstances of the case were such as to have put the plaintiffs upon inquiry, and to have affected them with notice of the actual dealings and transactions of Hodgkin.

That it was not the fact that there was a general account current, or any general account, between Hodgkin and Messrs. Rennie, Clowes, & Co., in which he was credited with the proceeds of the consignments and debited with the amount of the advances and the agency charges of the said Messrs. Rennie, Clowes, & Co.; but that in fact the several consignments of goods * made * 576 by Hodgkin were respectively made at considerable intervals of time and by different ships or vessels, and that each consignment, and the proceeds, advances, and charges in respect thereof, formed the subject of a separate and distinct account between them and Hodgkin, and that at the date of the trust-deed there were three separate consignments made by Hodgkin to Messrs. Rennie, Clowes, & Co., remaining to be accounted for by them the said Messrs. Rennie, Clowes, & Co., and which were the subject of such separate accounts as aforesaid.

That the 6000 pieces constituted one of these consignments, distinct from the others, and were shipped by a vessel called the "Hougomont," and that immediately when this consignment was made Messrs. Rennie, Clowes, & Co. made an advance to Hodgkin on the security of it to the extent of 1100*l.*, and that such advance was made by an acceptance of Rennie, Clowes, & Co. of a bill drawn upon them by Hodgkin, dated the 17th day of January, 1856, and payable three months after date, and which was subsequently discounted by Hodgkin before his suspension of payment, and was duly met by Rennie, Clowes, & Co., at maturity.

That this bill was drawn and accepted expressly against the shipment of the 6000 pieces by the "Hougomont" and on the security thereof. That Rennie, Clowes, & Co. rendered three separate

accounts in respect of the three separate consignments which remained to be accounted for at the date of the trust-deed. That by the account so rendered in respect of the said 6000 pieces shipped by the "Hougomont," it appeared that after crediting the proceeds of that consignment, and debiting the advance and agency charges in respect thereof, there was due to the * 577 estate * of Hodgins a balance of 222*l.* 10*s.* 6*d.* and no more in respect of the last-mentioned consignment. That by the accounts so rendered in respect of the other consignments it appeared that upon crediting the proceeds of each of such consignments respectively, and debiting the advances and agency charges in respect thereof respectively, there were balances due in each case to the estate of Hodgins; that is to say, in the case of one of the consignments, a balance of 276*l.* 0*s.* 4*d.*, and in the case of the other a balance of 311*l.* 17*s.*

That Messrs. Rennie, Clowes, & Co. admitted, and that it was the fact, that when the three separate accounts were rendered in the month of December, 1856, but not at the date of the trust-deed, there were due from them to the estate of Hodgins upon the three separate accounts the three several balances of 222*l.* 10*s.* 6*d.*, 276*l.* 0*s.* 4*d.*, and 311*l.* 17*s.* respectively, and not one balance of 810*l.* 7*s.* 11*d.*

They also stated that a general meeting of the creditors of Hodgins took place on the 5th day of April, 1856, at which a written statement of his assets and liabilities was submitted to the consideration of his creditors, and that in such statement credit was taken for the expected proceeds of all the three separate consignments as being his own property.

They also said that they were severally present at the meeting and that the plaintiffs were also there, and that at that meeting it was resolved by the creditors that Hodgins should execute the trust-deed for the benefit of his creditors, which he afterwards in fact executed; but that neither at that meeting, nor on any other occasion before the execution of the trust-deed by Hodgins, * 578 did * the plaintiffs or either of them make any such claim as was set up in the suit.

By the order under appeal it was ordered that the defendants should, on or before the 18th of February, 1861, pay the said sum of 810*l.* 7*s.* 11*d.* to the plaintiffs, and that such payment was to be

without prejudice to the plaintiffs' right to come in under the creditors' deed dated the 16th day of April, 1858, and prove for the residue of their debt against the estate of Hodgkin. And it was ordered that the plaintiffs' costs should be paid by the defendants.

The Vice-Chancellor, in giving judgment said, that the three cargoes were in this position: the first cargo belonged to the plaintiffs and the other two to Hodgkin, and that the whole were sent out to Messrs. Rennie, Clowes, & Co., as factors, for sale on behalf of Hodgkin, and that they drew, as was the usual custom, against the cargo of each ship, and that as far as they were concerned each ship's cargo was sufficient to satisfy their drafts. That the result was that there remained in their hands in respect of the several balances a total balance of 810*l*. That the plaintiffs' case was, that the factors had it in their power, in case any one of the cargoes against which their principals had drawn had gone to the bottom of the sea, to apply as the factors pleased the proceeds of the other cargoes, in order to satisfy any balance that might be coming due in respect of their drafts upon the lost cargo. And his Honor said that he agreed with this view of the case, and considered that it disposed of the whole question. He thought the case of *Westzinthus*, in that respect, very analogous, and that, although it was put by the learned Judges there on the relation of principal and *surety, yet in a * 579 Court of Equity at all events, the view presented by the counsel in that case appeared the true one, and that it depended, in this respect, on the doctrine of marshalling. His Honor said, that, this being his opinion, the only point that remained was, whether after the factors had sent an account, in which they had credited Hodgkin with the proceeds of each ship and debited him with the bills so as to leave a balance, it was too late to insist on the right of marshalling. It appeared, however, to his Honor that so long as the money was still remaining in the factors' hands it was not too late, but that the persons who had the real title to the surplus proceeds had, until the fund had been actually parted with, the right to claim it, and that the mere circumstance of the factors having stated an account in a particular way on a matter which was to them utterly immaterial did not prevent the plaintiffs establishing a claim upon the proceeds from remaining undistributed in the hands of the factors.

Mr. Rolt and *Mr. De Gex*, for the plaintiff, relied upon *Re Westzinthus*. (a)

Mr. Daniel and *Mr. Little*, for the defendants. — First. The original contracts between Hodgin and the plaintiffs were really purchases by Hodgin. Secondly. If not, they became such by the mode in which accounts were settled between them, and the plaintiffs could not, after receiving the balance on this footing, disturb it. Thirdly. Each cargo was the subject of a distinct transaction between Hodgin and Rennie, Clowes, & Co., and the proceeds of it were, by the mode of drawing bills against those proceeds, liable only to the advances and expenses in respect of the particular * 580 cargo. Fourthly. If this was not originally so, the mode in which the factors had rendered their accounts had finally settled the matter, and that they had thereby abandoned any right of marshalling to which they might have resorted, but which they had not enforced or been concerned to enforce, and that after they had renounced it the plaintiffs could not set it up. Fifthly. That at all events the decree was wrong in leaving it open to the plaintiffs to prove under the trust-deed, as they could not adopt the sales by receiving their proceeds and also prove upon the footing of the fraud. (b)

They referred to *Aldrich v. Cooper*, (c) *Ex parte Stephenson*, (d) *Gregg v. Wells*, (e) *Coles v. The Bank of England*, (g) *Adams v. Claxton*, (h) *Vanderzee v. Willis*, (i) *Ex parte Bignold*, (k) *Pickard v. Sears*, (l) and contended that *Re Westzinthus* (a) was decided on the ground of the relation of principal and surety, which did not here apply.

Mr. Rolt, in reply.

Judgment reserved.

(a) 5 B. & Ad. 817.

(b) As to this, see *ex parte Biddulph*, 3 De G. & S. 587.

(c) 8 Ves. 382.

(h) 6 Ves. 225.

(d) De Gex, 586.

(i) 3 Bro. C. C. 21.

(e) 10 Ad. & El. 90.

(k) 2 Deac. 66.

(g) Id. 437.

(l) 6 Ad. & El. 469.

March 23.

THE LORD CHANCELLOR. — At the close of the argument on this appeal I confess that I entertained no doubt; but I took time to consider *some new arguments and authorities, * 581 which had not been brought to the notice of the Vice-Chancellor.

The case of *Re Westzinthus* (a) is a direct authority to show that, *prima facie*, the doctrine of marshalling, relied upon by the plaintiffs, applies in their favour. But it is contended that they are precluded from resorting to it, because they did not state to the creditors of Hodgkin, in the beginning of April, 1858, the fraud which he had practised upon them; and that, if they then had not notice of it, they had the means of knowledge. By "the means of knowledge" by which any one it to be affected must be understood means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself.¹ In one sense it may be said that all mankind had the means of knowledge of the planet Neptune before it was discovered by Adams or Leverrier. Not till December, 1858, could the plaintiffs be expected, in the course of business, to have known the fraud which Hodgkin had practised upon them, by misappropriating their consignment on board the "Hougomont," and then they made their claim.

It is said that the moneys claimed had then vested in the creditors under the assignment, but nothing passed by the assignment, except the property of Hodgkin, subject to any equitable claim upon it. As to the supposed representation by the plaintiffs of the truth of the accounts rendered by Hodgkin, the answer is, that the class of cases headed by *Pickard v. Sears* (b) have no application, as no such representation was made by the plaintiffs, and all the creditors of Hodgkin took the risk of his statement being true or false.

* The objection that the plaintiffs lost their right by not * 582 disclosing to the creditors an entry made by Hodgkin, for which he might have been prosecuted, hardly deserves notice, for they were not aware of it at any time when the disclosure could

(a) 5 B. & Ad. 817.

(b) 6 Ad. & El. 469.

¹ See *Jackson v. Rowe*, 2 Sim. & Stu. 472; *Ware v. Lord Egmont*, 4 De G., M. & G. 460; *Perry v. Holl*, 2 De G., F. & J. 38; *Kerr F. & M.* (1st Am. ed.) 236, 239.

have been of any service to the creditors, and it had no more influence upon the rights of the creditors than any other offence which he might have committed wholly unconnected with this transaction.

Cases were cited to show that there can be no marshalling after the estate of an insolvent is placed in a course of administration in bankruptcy, or under a composition deed, but these cases apply to the right of tacking claimed by a particular creditor, and not to the equitable deductions from the assets coming to the assignees to be divided among the creditors.

Lastly, it was urged, that the plaintiffs could not have the benefit of the assignment and, at the same time, make this claim for the 812*l*. But I think that Hodgin was to be considered their debtor for the consignment by the "Hougomont," and that they do not release his estate by following the proceeds of that consignment into the hands of Rennie, Clowes, & Co.

The decree of the Vice-Chancellor, therefore, seems to me to be in all respects correct, and the appeal must be dismissed with costs.

CHAMBRES *v.* NORRIS.

1861. April 17, 20, 24. Before the Lord Chancellor Lord CAMPBELL.

Although a purchaser to whom land out of the jurisdiction of the Court has been agreed to be sold by a person within the jurisdiction, may sue him for a specific performance of the agreement,¹ or may possibly enforce a lien for money paid by the plaintiff on account of the price, he cannot sue here a third person to whom the vendor has afterwards sold the property, although such third person had notice of the former contract, there being no privity of contract between the two purchasers.

Nor will the Court interfere if the matter is the subject of litigation in a foreign Court which has means of deciding upon and enforcing the rights of the parties.

¹ See *Cleveland v. Burrell*, 25 Barb. 532; *Newborn v. Bronson*, 3 Kernan, 587; 2 Dan. Ch. Pr. (4th Am. ed.) 1031, note (8), 1033, note (5); *Fry Specif. Perfm.* (2d Am. ed.) 69, 70.

THIS was an appeal from the dismissal by the Master of the Rolls of the bill which sought to establish a charge on a mine in Prussia, called "*The Maria Anna and Steinbank Colliery*." The facts are stated in the 29th volume of Mr. Beavan's Reports, (a) where the case is reported below.

A cross appeal came on to be heard at the same time. The nature of it appears sufficiently from the Lord Chancellor's judgment.

Mr. Bagshawe and Mr. Bagshawe, Jr., for the appellant Norris.

Mr. Selwyn and Mr. Eddis, for the defendants Chambres and Sutton.

Mr. Roundell Palmer, Mr. Lloyd, Mr. H. Stevens, and Mr. Riddell, for other parties.

Penn v. Lord Baltimore (b) was referred to.

THE LORD CHANCELLOR. — I am of opinion that there is no ground for either of these appeals.

In the first case I think the bill was properly * dismissed. * 584 In as far as the bill prays a winding-up and a taking of partnership accounts and any thing, irrespective of the claim for 40,000*l.*, in the first prayer of the bill supposed to have been advanced by John Sadleir for the Anglo-Prussian Coal and Coke Company, the Master of the Rolls shows in the clearest manner that the suit is not constituted so as to entitle the plaintiff to the relief which he seeks, and indeed this part of the case was not strongly pressed by the appellant's counsel at the bar.

With respect to this advance, I think that, upon the authority of *Penn v. Lord Baltimore*, which has often been acted upon, the plaintiff would have been entitled to succeed if he could have proved that the claim for a declaration of the proposed lien or charge on the Maria Anna mine was founded on any contract or privity between him or the deceased John Sadleir and the defendants, the purchasers of the mine, and if there had not been a suit in the Prussian Courts, in which the same question was raised and has been decided in the plaintiff's favour.

(a) Page 246.

(b) 1 Ves. Sen. 445.

But I agree in thinking with the Master of the Rolls that the plaintiff has failed to show any such contract or privity. Upon the evidence adduced the purchasers of the mine, whom he sues, are to be considered as mere strangers, and any notice which they may have had of transactions between John Sadleir and the Anglo-Prussian Coal and Coke Company (which has now ceased to exist) cannot give this Court jurisdiction to declare the proposed lien or charge on lands in a foreign country. An English Court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and

which in the country where the lands to be charged by it
 * 585 lie * would probably be treated as *brutum fulmen*. I do not think that the Court of Chancery would give effect to a charge on land in the county of Middlesex so created by a Prussian Court sitting at Dusseldorf or Cologne.

But another objection is "*lis alibi pendens*," a suit pending before the proper tribunal in Prussia, and that by this tribunal, which has undoubted jurisdiction to do complete justice between these parties, a decree has actually been pronounced in favour of the plaintiff, giving him what he seeks by the first prayer in this bill. The answer attempted to this objection is, that he was not the plaintiff or "*actor*" in that suit; but he appeared to it, stating his claim in respect of the 40,000*l.*, and that claim was allowed. We must suppose that the Court at Dusseldorf has ample means to enforce the whole of its decree, and that the plaintiff will have the full benefit of that decree, which may be considered as creating a debt for which the opposite parties are personally liable and a charge upon the property sold.

There was an appeal against the decree to the Judges of the Superior Court at Cologne, and they expressed an intention to reverse it on the erroneous statement, unaccountably made to them by three English barristers, that, according to the law of England, this sum of money was in the nature of real estate, and that real estate of which a *felo de se* dies seised in fee escheats to the crown. But there can be no doubt that this mistake will be corrected as soon as the solemn declaration of the law of England upon the subject by the decree of the Master of the Rolls is brought before the Court of Appeal at Cologne.

The declaration in this decree is the subject of the cross appeal now to be disposed of.

* The appellants in this appeal do not object to the declaration, as far as it goes, "that, according to the law of England, the sum of 40,000*l.* and 15,000*l.* in the bill mentioned would form part of the said John Sadleir's personal estate, and be payable to the plaintiff or his administrator." They only pray that to this declaration the following addition should be made, "but inasmuch as the 40,000*l.* and 15,000*l.* represent mining property in Prussia, such sums, according to the law of England, were not governed by it, but by the law of Prussia applicable to such estate." Now I think that this would be a very improper addition, as this company was substantially an English company, and at any rate it is clearly within the jurisdiction of the Prussian Court to determine whether the right to the fund is to be guided by the law of Prussia or by the law of England.

I am therefore of opinion that both appeals should be dismissed with costs. Costs to be set off.

* HALEY v. HAMMERSLEY.

* 587

1861. April 20, 24, 27. Before the Lord Chancellor Lord CAMPBELL.

A mortgage of a silk mill, with the steam-engines, boilers, steam-pipes, main shafting, mill gearing, millwright's work, and all other machinery whatsoever, being, or which should thereafter be, on the lands described in the mortgage. *Held*, as against a second mortgagee, not to be confined to machinery necessary for giving power to the mill as being *ejusdem generis* with the specified particulars, but to extend to silk-spinning machines, resting by their weight only on the ground, but attached by movable bolts to iron rods fixed to mill beams over head.¹

THIS was an appeal from a decision of the Master of the Rolls upon an adjourned summons, which had been taken out by arrangement for the purpose of determining, as between the first

¹ See 1 Dart V. & P. (4th Eng. ed.) 121, 491, 492; *Ex parte Barclay*, 5 De G. M. & G. 410, note (1), and cases cited; 1 Sugden V. & P. (8th Am. ed.) 33, § 58, and note (x), and cases there cited; *Ex parte Astbury*, L. R. 4 Ch. Ap. 630; *Boyd v. Shorrocks*, L. R. 5 Eq. 72; *Farrar v. Stackpole*, 6 Greenl. 154; *Lampman v. Milks*, 21 N. Y. 510.

and second mortgagees of certain pieces of land, the construction and effect of the first mortgage as to fixtures upon the land.

By that deed, dated the 29th September, 1853, certain plots of land, together with particulars thus described: "and also all that silk mill now erected or in the course of erection on the said several plots of land or some part thereof, and all other buildings now or thereafter to be erected thereon, and also all those the steam-engines or steam-engine, boilers, steam-pipes, main shafting, mill-gearing, millwright's works, and other machinery and fixtures whatsoever now erected or set up or standing or being, or which shall at any time hereafter be erected, or set up, or stand or be, in or upon the said plots of land, mill, and premises, or any part or parts thereof, together with the appurtenances to the said hereditaments and premises belonging," were expressed to be granted and released to the use of the first mortgagees, their heirs and assigns, subject to a proviso for redemption on payment of 4500*l.*, with interest, and of further advances not exceeding in the whole 6000*l.* By a deed of further charge the premises were charged in favour of the first mortgagees with a further sum of 3800*l.*

The second mortgage was dated the 21st October, 1857, and by it the same lands, "together with the steam-engines * 588 *or steam-engine, boilers, steam-pipes, main shafting, mill-gearing, mill-wright's works, and other machinery, plant, fixtures, erections, and works fixed and unfixed, implements and things constructed and standing and being in or upon or about the said lands and premises and used in the manufactory works," were expressed to be granted and released to the second mortgagees, subject to a proviso for redemption on payment of the principal money and interest therein mentioned, and subject nevertheless to the first mortgage and further charge.

The suit was one for the administration of the estate of one of the first mortgagees, and by an order dated the 23d November, 1858, it was ordered that the first mortgagees should sell the property comprised in the indentures of mortgage and further charge. The property was accordingly advertized for sale under the direction of the Court. On the 17th of February, 1859, the second mortgagees gave notice in writing to the first mortgagees that the second mortgagees claimed, as being subject to their security exclusively, all the machinery, implements, articles, and

things detailed and described in the inventory annexed to their notice, being in fact all the machinery, except such as contributed to the motive power of the mill, which the second mortgagees contended was alone subject to the first mortgage.

By an agreement dated the 11th March, 1859, it was agreed that the question should be determined on a summons. The case was adjourned into Court, and on the 22d December, 1860, the Master of the Rolls decided in favour of the second mortgagees. The first mortgagees appealed.

* *Mr. R. Palmer* and *Mr. Little*, for the appellants, referred * 589 to *Mather v. Fraser*, (a) *Hutchinson v. Kay*, (b) *Fisher v. Dixon*, (c) *Ex parte Barclay*, (d) *Malsley v. Milne*, (e) *Hubbard v. Bagshaw*, (g) *Metropolitan Counties Insurance Society v. Brown*, (h) *Wiltshier v. Cottrell*, (i) *Trappes v. Harter*, (k) *Hellawell v. Eastwood*, (l) *Poole's Case*, (m) *Ryall v. Rolle*, (n) and *Place v. Fagg*. (o)

Mr. Selwyn and *Mr. Hardy*, for the respondents, referred to *Waterfall v. Penistone*, (p) *Davis v. Jones*, (q) *Elliot v. Bishop*, (r) and *Whitmore v. Empson*. (s)

Mr. R. Palmer, in reply, referred to *Penton v. Robart*, (t) and *Darby v. Harris*. (u)

Judgment reserved.

April 27.

THE LORD CHANCELLOR.—This case turns upon the construction to be put upon a mortgage deed, dated the 29th of September,

- | | |
|--|-----------------------|
| (a) 2 K. & J. 536. | (h) 26 Beav. 454. |
| (b) 23 Beav. 413. | (i) 1 El. & Bl. 674. |
| (c) 12 Cl. & Fin. 312. | (k) 2 Cr. & M. 153. |
| (d) 5 De G., M. & G. 403, 410. | (l) 6 Exch. 295, 312. |
| (e) 7 C. B., N. S. 115. | (m) 1 Salk. 368. |
| (g) 4 Sim. 326. | |
| (n) 1 Ves. Sen. 348; S. C., 1 Ath. 165, 175. | |
| (o) 4 Man. & Ry. 277. | (q) 2 B. & Ald. 165. |
| (p) 6 El. & Bl. 876. | |
| (r) 10 Exch. 496, 522; 11 Exch. 113. | |
| (s) 23 Beav. 313. | (u) 1 Q. B. 895. |
| (t) 4 Esp. 33; S. C., 2 East, 88. | |

1853, by which John Lovatt and Joseph Gould, describing themselves as "silk manufacturers and copartners, carrying on business under the firm of Lovatt & Gould," conveyed to the defendants certain plots of land at Leek, in the county of Stafford,

* 590 "and also all that silk mill * then erected or in the course of erection, and all other buildings then or thereafter to be erected thereon, and also all those the steam-engines or steam-engine, boilers, steam-pipes, main shafting, mill-gearing, mill-wright's work and other machinery and fixtures whatsoever then erected or set up or standing or being, or which should at any time thereafter be erected or set up or stand or be, in or upon the said plots of land, mill, and premises, or any part or parts thereof," to secure 4500*l.* and future advances up to 6000*l.*

There was a deed of further charge between the same parties in December, 1856, on the same property.

The mortgagors having for years carried on in this silk mill the business of silk manufacturers, on the 21st of October, 1857, executed another mortgage of the land, mill, and machinery, to the plaintiffs, with a more specific description of the property mortgaged.

The question has arisen between these parties, whether the mortgage to the defendants was to be confined to such machinery or fixtures in the mill as contributed to the moving power in the mill, or extended to all the machinery and fixtures in the mill fastened to the roof, floor, or sides of the mill, and used in the manufacturing of silk within the mill?

The Master of the Rolls, after a most careful consideration of the case, came to the conclusion, that in construing the words "other machinery and fixtures whatsoever erected or set up or standing or being, or which at any time thereafter should be erected or set up or stand or be, upon the land or in the mill," the word "machinery" must be confined to the machinery which was necessary for the purpose of giving power to the

* 591 * mill, and that only fixtures so necessary were included in the mortgage.

I am bound to say that, with the most sincere deference for the authority of the learned Judge, and, after a very deliberate consideration of the subject, I have felt myself compelled to come to a contrary conclusion.

I must begin by observing that this case does not depend upon

the general law of fixtures as between heir and executor, or between tenant for life and remainder-man, or between landlord and tenant, and that the cases decided between parties standing in any of those relations to each other, without any special contract, can be of very little service to us. We have here an express contract by deed, under which the defendants claim. The mortgagors, being absolute owners of the silk mill, and not only of all the property specifically described in the mortgage deed, but of all the property claimed by the defendants under the general words which are added, have made over to the mortgagees, as a security for 4500*l.*, the silk mill and also the steam-engine or engines, steam boilers, steam-pipes, main shafting, mill gearing, millwright's work and other machinery and fixtures whatsoever in or upon the land, mill, and premises mortgaged, or any part thereof. His Honor assumes that all the machinery and fixtures specifically enumerated are necessary to give power to the mill, and infers that none others pass. He says, "I think that the words 'other machinery' must be read as words *ejusdem generis* with those which precede them, and that they are confined to all the machinery which is necessary for the purpose of giving power to the mill."

In the first place I do not distinctly see that the specific enumeration is so limited to the supposed genus. * The * 592 mortgage is of a silk mill, and I do not know that the mill gearing and all the millwright's work is exclusively applicable for giving power to the mill. At any rate we find added the words "and other machinery and fixtures whatsoever erected or set up or standing in or upon the land, mill, or premises." All the disputed articles are admitted to be "machinery erected, set up, and standing in and upon the mill," and used in it for the manufacturing of silk within the mill. They are all fixed by iron or other fastenings to the roof, sides, or floor of the mill. I allow that the description would not include hand tools or movable implements, though used in the business, nor would it apply to carpets nailed to the floor of a room within the mill, nor to pictures hung against the walls of such a room, although fixed to the walls by metallic bolts. But if the enumerated matters are all used to give power to the mill, I do not see why the following words (which are as comprehensive as could be devised to include the machinery which is moved as well as the moving machinery) should have such a restricted interpretation. Very many ma-

chines, such as a watch or steam thrashing machine, comprehend the moving power, and along with it the machinery employed to accomplish the object for which the machine is contrived.

There would be no absurdity in including in the security all the machinery placed in the mill, whether for creating power or being moved by the power created. On the contrary, it seems rather improbable that the parties should have contemplated such a damaging disruption of the machinery as must take place if the mortgagees, in seeking to make good their security, must tear in pieces the machinery in the mill, removing and selling one half

of it, which would be comparatively of little value without * 593 the other half. Accordingly in the mortgage * to the plaintiffs it is admitted that the whole of the machinery passes, although to comprehend it, I do not think that the additional words do more than express what is implied by the general words used in the first mortgage to the defendants.

The admissions to which the parties have very properly come contain an inventory of the contested articles of machinery. In this, No. 18 has been taken as the example, and the Master of the Rolls has said, that if he is wrong in his construction of the deed by excluding this article, all the others ought to be included. He says, "The most important of them are the silk-spinning machines (No. 18). Iron spinning mills or machines, driven by cotton bands from a tin roller, three heights each, 324 spindles or 2196 spindles for 4½-inch bobbin in iron frames, with drawing-straps. Several loose wood oil-catching troughs lie on the floor round the machines. Now the description of them is this: All the spinning mills in this room are about nine feet high, the room itself being only ten feet high. Four of these machines were placed in the mill in 1857 and five in 1856. Each frame of the machines has ten double legs, with round iron feet. These feet are not attached to the floor or building, simply resting upon it. They are of considerable weight, and do not reach the ceiling. To each machine there are attached six forged iron rods, seven-eight inch in diameter, fastened at one end by three spike nails three or four inches long to the mill beams over head, and at the other by means of a bolt measuring half an inch in diameter to various parts of the machine, which bolt does not pass through any expressly made screw-hole, but through a convenient slit in the framework, and is secured by a nut screwing into the end of the

bolt, and of a size to correspond therewith. By unscrewing the nut on the bolt the machine becomes entirely *sepa- * 594 rated from the stay rods, the latter being attached to the beams on the ceiling. The upper spindles can be detached by merely lifting them off. Each machine has also two wire guards to fence the wheels. The guard at one end is attached to the machine by a bolt with a nut, the other end hooks on to the machine."

Now these are called "machines," and they unquestionably are part of the "machinery" erected, standing and being in the silk mill used for the manufacturing of silk therein. They may be unscrewed and removed; but they are permanently fastened to iron rods, which are part of the roof of the mill, and are fixed to the freehold.

I likewise think that the machines described under No. 18, and so fixed to the roof of the building, might pass as fixtures under this deed. Between these parties the criterion is not what is affixed to the freehold for the permanent improvement of the freehold, but what is set up in the mill to be used as machinery or fixtures in carrying on the business of manufacturing silk in the mill.

Now are we to consider whether such machines or fixtures are distrainable for rent, or might be taken in execution by the sheriff under a *feri facias*. Although they are not fixed to the freehold to remain there for ever for the permanent enjoyment of the building, they were the property of the mortgagors, who have assigned them to the mortgagees as part of the security for the 4500*l.* advanced. Of course it was not intended that the mortgagors should afterwards derogate from their grant and give a preferable right to the plaintiffs.

The language of the deed of the 29th of September, 1853, being in my opinion unambiguous; with respect to authority, I content myself with saying, that I entirely concur with the Vice-Chancellor PAGE WOOD in his *general view of the law * 595 upon this subject in *Mather v. Fraser* and that I do not consider it necessary again to go over the decisions which I commented upon in my judgment in the House of Lords in *Fisher v. Dixon*.

Being clearly of opinion that, according to the true construction

of the mortgage deed, all the disputed articles are included in the mortgage to the defendants, I must adjudge that the decree appealed against be reversed.

SELBY v. POMFRET.

1861. April 25. May 1. Before the LORD CHANCELLOR.

On a suit instituted by the assignees of a bankrupt mortgagor for payment of the surplus of the proceeds of the mortgaged property which had been sold by transferees of the mortgage: *Held*, that the transferees were entitled to tack a debt insufficiently secured by a previous mortgage of other property made to them directly, although they took the transfer after and with notice of the adjudication of bankruptcy.¹

THIS was an appeal from the dismissal by Vice-Chancellor Wood of the bill of the appellants, who were assignees in bankruptcy of a mortgagor, and sought by their bill payment of the balance of the proceeds of the sale of the mortgaged premises; the mortgagees insisting on a right to tack the mortgage to one of other property. The case is reported below by Messrs. Johnson and Hemming. (a) By the last-mentioned mortgage, which was dated the 26th June, 1858, and made between the bankrupt of the one part and the defendants of the other part, the bankrupt assigned leasehold property in Mark Lane to the defendants, by way of security for the payment of five several promissory notes for 1000*l.* each, made by the bankrupt, of even date with the deed, and payable at six, nine, twelve, eighteen, and twenty-four months after date, respectively.

The other mortgage of which the defendants were transferees was dated February 1st, 1860, and thereby the bankrupt mortgaged leasehold land at Herne Hill to Messrs. Stileman and Neate, for 1000*l.*, with a power of sale.

(a) 1 J. & H. 336.

¹ See *Watts v. Symes*, 1 De G., M. & G. 240, and note (2); *Vint v. Padget*, 2 De G. & J. 641, note (1); 1 Sugden V. & P. (8th Am. ed.) 196, and cases in note (k), 197; 1 Washb. Real Estate (1st ed.), 540, 541, and cases in notes; *Beever v. Luck*, L. R., 4 Eq. 537; *Thompson v. Hudson*, L. R., 10 Eq. 497.

* On the 9th of February, the mortgagor was adjudicated * 596 bankrupt, and soon afterwards the plaintiffs were appointed assignees. On the 16th of February, 1859, the defendants paid to Messrs. Stileman and Neate the amount due on their mortgage, and took a transfer of their security. The transfer was made without the acquiescence or privity of the assignees; and the transferees had at that time notice of the bankruptcy.

In March, 1859, the defendants, under the power of sale contained in the mortgage of the premises at Herne Hill, sold those premises for 1800*l.*, and retained the purchase-money in or towards the discharge of the amount due to them upon both their securities."

The plaintiffs by their bill claimed to be entitled to the surplus of the proceeds of the sale of the Herne Hill property, after deducting therefrom any sum or sums which the defendants might be entitled to retain under the security of the 16th February, 1859.

Sir H. Cairns, and *Mr. W. Knox Wigram*, for the plaintiffs. — The right to tack can only arise in suits to redeem, and this in the nature of a foreclosure suit. Nor could it prevail on behalf of a transferee, who had taken his transfer after the bankruptcy of the mortgagor, and with notice of it. If it could have been otherwise available, it cannot be so after the exercise of the power of sale.

They referred to *Holmes v. Turner*, (a) *Ex parte Bignold*, (b) *Smeathman v. Bray*. (c)

Mr. Rolt and *Mr. Druce*, for the defendants, referred to *Watts v. Symes*, (d) *Vint v. Padget*, (e) *Ex parte* * 597 *Knott*, (g) *Grugeon v. Gerrard*, (h) *Ex parte Berridge*, (i) *Trebourg v. Lord Pomfret*, (k) and *Hipkins v. Amery*. (l)

Sir Hugh Cairns, in reply.

Judgment reserved.

(a) 7 Hare, 367, note.

(b) 2 Deac. 66.

(c) 15 Jur. 1051.

(d) 1 De G., M. & G. 240-246.

(e) 2 De G. & J. 611.

(g) 11 Ves. 609.

(h) 4 Y. & C. 119.

(i) 3 M. D. & De G. 464.

(k) Note to *Ex parte Carter*, Amb. 733.

(l) 2 Giff. 292.

THE LORD CHANCELLOR. — I am of opinion that the decree under appeal ought to be affirmed.

It does seem strange that mortgagees after the bankruptcy of the mortgagor should be allowed by their own act to vary the rights of themselves and the other creditors of the mortgagor, so as to obtain payment in full of a debt in respect of which, at the time of the bankruptcy, they were only entitled to a dividend along with the body of unsecured creditors. But it is settled that a mortgage executed by a bankrupt before his bankruptcy, where the value of the land mortgaged exceeds the sum secured, is, upon the bankruptcy of the mortgagor, to be considered *tabula in naufragio*, and if the assignees do not immediately redeem, any mortgage of the bankrupt, whose security is insufficient, may take an assignment of the mortgage and tack to it the debt due under the mortgage to himself. Therefore, the Vice-Chancellor truly observes, "The fact of the bankruptcy before the defendants took the transfer made no difference. Any one might seize the plank. The assignees might have got the benefit of it if they had been quick enough; but the defendants were more alert."

* 598 * *Sir Hugh Cairns*, fully admitting the right of the mortgagee to tack in a "suit to redeem," questioned this right in a "suit to foreclose;" but since the case of *Watts v. Symes* this distinction can no longer be insisted upon. It is a mistake to suppose that the right of the mortgagee to tack in a suit for foreclosure was then an innovation; for, although doubts upon the point had existed, the doctrine was supported by prior authorities; and on principle there seems to be no reason to vary the rights of the mortgagee, whether he be active or passive in the suit which is to bring the mortgage transactions to a termination.

The only ground on which the claim of the defendants in this suit can be disputed is, that they have sold the mortgaged premises. *Sir Hugh Cairns* very ingeniously argued that the only reason why the right to tack is allowed in a suit to redeem is, that by this proceeding the mortgagor recovers possession of the mortgaged premises. But I think he failed to make good his proposition, either on principle or by authority, and it cannot apply to a suit to foreclose, in which the right to tack must now be considered as established.

The defendants sold the mortgaged premises under the power of sale contained in the mortgage deed. As transferees of the

mortgage, they were lawfully entitled to receive the whole of the purchase-money, and therefore they had a right to apply the surplus beyond what was due under this mortgage to satisfy the sum due to them on the other mortgages executed by the bankrupt, as if they had been defendants in a suit to redeem or plaintiffs in a suit to foreclose.

I must therefore adjudge that the appeal be dismissed with costs.

* *Ex parte* THOMAS HEARD MORTIMORE. * 599

In the Matter of THOMAS HEARD MORTIMORE.

1861. January 30, 31. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

M., a tanner, employed as his factors S. & Co., a firm in high repute, one of the members of which was his brother, and they were in the habit of accommodating him with money to a large amount. He never took stock, and did not accurately know the state of his affairs. In 1857, there was a panic in the leather trade and his stock suffered a heavy depreciation, from which it never recovered. M. fully believed himself to be solvent, though he was aware that but for the accommodation afforded him by S. & Co., he must have stopped payment, and he went on trading until July, 1860, when S. & Co. stopped payment. M. then investigated his affairs, and found that he had been insolvent ever since the end of 1858. He then at once stopped payment and presented a petition for arrangement with his creditors, under §§ 211-223, of the Bankrupt Act of 1849.

Held, by the Lord Chancellor and the Lord Justice KNIGHT BRUCE, that M. could not be considered to have contracted his debts "without reasonable probability at the time of contract of being able to pay them," for that this means without a reasonable probability, reasonably supposed by the trader to exist at the time of contract, that he would be able to pay; and that, having regard to his reasonably grounded expectation that S. & Co. would enable him to meet his engagements, he might reasonably believe that he would be able to pay. But, per the Lord Justice TURNER, whether the "reasonable probability" ought not to be measured by the means and credit of the petitioner himself, having regard to the extent to which a prudent man would trust him in the course of business, and not by the help derived from friends? ¹

¹ See *Ex parte* Bayley, L. R. 3 Ch. Ap. 244; *In re* Marks, L. R. 1 Ch. Ap. 334.

Held, by the whole Court, that the trader had not delayed the presentation of his petition "longer than was excusable," inasmuch as he continued to trade in the belief that, with the assistance of S. & Co., he would be able to carry it on with ultimate success; though, if he had investigated his affairs, it would have appeared that his debts exceeded his assets for more than two years before his stoppage.

THIS was a petition by Thomas Heard Mortimore to discharge an order of Mr. Commissioner FONBLANQUE, adjudging him bankrupt, upon a petition presented by him under the arrangement clauses, sects. 211-223, of the Bankrupt Law Consolidation Act of 1849. The order complained of had been made by the Commissioner on the ground that the appellant had delayed the presentation of his petition longer than was excusable.

The appellant was a tanner at Andover, and also a farmer. * 600 He had carried on business in partnership with * his father until 1835, and since that alone. The course of his business was as follows: Streatfield, Lawrence, & Co. were his agents in London. They bought for him on commission raw hides, which were then sent to him to be tanned. When they had been tanned, which took from nine to twelve months, he sent them to Streatfield & Co. to be sold on commission. His brother was a partner in the firm of Streatfield & Co., and that firm were in the habit of making considerable cash advances to him to enable him to defray the expenses of tanning. For these advances they drew bills on him, which he accepted and they negotiated. They remitted money to him to meet the bills, and if the state of the sales was such that they had not the funds of his in hand for that purpose, they drew upon him fresh bills, which he accepted and they negotiated. These bills were always drawn for fractional sums, as if they had been drawn in respect of particular transactions in the regular way of business. On some occasions bills were renewed, and the renewed bills were always for different amounts from the old ones. Streatfield & Co. had a branch house at Liverpool, under the firm of Lawrence, Mortimore, & Co., the partners in which were the partners in the London house, with one additional partner. The appellant had no dealings with Lawrence, Mortimore, & Co., but occasionally accepted bills drawn upon him in their name, and sent to him by Streatfield & Co., upon advances being made to him by Streatfield & Co. The appellant admitted that but for the assistance afforded him by Streatfield & Co. he must have stopped payment long before

the time at which he did. The appellant was not in the habit of taking stock, and so did not know very accurately the state of his own affairs. He appeared to have lived economically, to have had no great skill in accounts, and to have supposed his business to be prosperous. In 1857 there was a panic in the leather trade * and his stock in trade consequently became much depre- * 601
ciated in value, from which, owing to the state of trade, it never recovered. In July, 1860, Streatfield & Co., who up to that time were in good repute, and as it appeared were considered by the appellant and by all the trading community to be of undoubted solvency, stopped payment: this obliged the appellant to look into his affairs, and the result was that he stopped payment, and on the 31st of August presented a petition under the arrangement clauses, upon which an order for protection was made. His proposals for arrangement were assented to by more than the required proportion of his creditors, and were opposed by one firm only, who were holders of a bill for 3000*l.*, his debts in the whole being considerably above 90,000*l.* The appellant on his examination deposed that he never knew or suspected himself to be insolvent till the stoppage of Streatfield & Co. obliged him to look into his affairs more minutely. It was shown that he had sustained heavy loss in the panic of 1857, though it did not clearly appear that he became actually insolvent at that time. It was clear, however, that soon afterwards his liabilities exceeded his assets and he himself admitted that, from his investigation in 1860, he had no doubt that he must have been insolvent before the end of 1858, and that the deficiency had since constantly gone on increasing. He admitted also that for some months before his stoppage he well knew that, if Streatfield & Co. withdrew their assistance, he must at once stop payment. The commissioner under these circumstances considered that the petition ought to have been presented at all events before the beginning of 1860, and that the delaying it so long was not excusable. He accordingly adjudged the appellant bankrupt and adjourned the proceedings into the public Court.

Sir Hugh Cairns and *Mr. Druce*, for the appellant. —

* The appellant, until just before his petition for arrange- * 602
ment was presented, had no notion that he was insolvent.
He had substantially no creditor but Streatfield & Co. It is true

that there were bills of his out in the world, but having the name of that firm on them they were looked upon as equally good with bank-notes, and the appellant had good reason to believe that Streatfield & Co. would enable him to meet them. The questions are, whether where a man believes himself to be solvent he is to be refused the benefit of the arrangement clauses, because a more thorough investigation would have shown him that he had been for some time insolvent, there being no wilful abstaining from investigation; and whether, where all the creditors but one are willing to accede to an arrangement, the commissioner is bound under such circumstances to refuse it. We submit that the clause is not imperative, the words being "it shall be lawful;" and, moreover, that it was not intended to apply to a case where there has been no wilful postponement with knowledge of insolvency, for the Act does not speak of postponement longer than was proper or longer than was justifiable, but longer than was "excusable," which implies conduct not altogether proper. It certainly is desirable that a mercantile man should regularly take stock, but upon the cognate subject of keeping accounts there is in the Bankruptcy Act, § 256 and elsewhere, a broad distinction taken between mere negligence and wilful misconduct. Here the appellant was more of a farmer than a mercantile man; was unskilled in accounts and went on as farmers do, living on the proceeds of his business, which he believed to be going on well. Even if he had known that he was insolvent, it would not have been his duty to stop trading at a time when stock in the leather trade was suffering under such an extraordinary depreciation, from which there was every reason to believe it would recover. The delay was "excusable" if

* 603 it was *bond fide*, * and even if the excuse was not sufficient, we submit that it is not a sound exercise of the commissioner's discretion to throw the estate into bankruptcy against the wish of a vast majority of the creditors.

Mr. Bacon and *Mr. Roxburgh*, for the firm of opposing creditors. — We do not deny that the commissioner had a discretion, but we say that he rightly exercised it. That one creditor opposes is enough; the arrangement clauses enable a certain majority to bind the dissentient minority, and this ought not in general to be allowed in cases of misconduct coming within the provisions. The delay in presenting the petition was inexcusable. A gentle-

man carrying on business on a very large scale excuses himself on the ground that he never took stock. No trader can be allowed to allege by way of excuse ignorance arising from his omission to follow the ordinary course of trade. Moreover, his losses in 1857, of which he was well aware, made it his bounden duty to look into the state of his affairs. From that time his trade was carried on at a loss. The bills drawn on him by Streatfield & Co. must be regarded as accommodation bills; they were drawn for particular sums, but did not represent real transactions, and the renewed bills were for different amounts from the old ones. There was an intention to mislead, and the debts were contracted by means of fraud.

[THE LORD JUSTICE TURNER. — Did Streatfield & Co. ever draw on him to an amount exceeding the then estimated value of the consignments? The evidence does not furnish an answer to that question.]

The trader also accepted bills drawn by the Liverpool house, with which he had no dealings at all. He saw that Streatfield & Co. were obliged to renew his bills in order to continue their accommodation to him; he had therefore no right to assume their solvency. The *opposing creditor suffers by holding paper * 604 of the appellant, which paper, if the trade had been stopped in reasonable time, would have had no existence.

[THE LORD CHANCELLOR. — If a man believed himself solvent but for the pressure of the market, and was able to go on with help, of which he had good reason to expect the continuance, should you say it was inexcusable in him to go on trading?]

No; if he could get a person to lend him money; but the case is very different when the money is only obtained by the use of the name of another person, who is not willing actually to advance money. The transaction with the Liverpool house was a clear indication that Streatfield & Co. were somewhat embarrassed, and could hardly fail to lead Mortimore to doubt their stability, which the commissioner considered he did. The statute evidently means to give the commissioner power to adjudge the trader a bankrupt if he has delayed the presentation of his petition longer than he ought.

[THE LORD JUSTICE KNIGHT BRUCE. — Do you contend that a trader is bound to stop his trade as soon as his debts exceed his assets?]

No; it is impossible to lay down any general rule; each case must be judged of by its own circumstances. *Ex parte Johnson*, (a) *Ex parte Dornford*; (b) *Ex parte Rufford*. (c) The continuance of trading is clearly unjustifiable when the trader has no reasonable prospect of being able to pay the fresh liabilities he contracts, which is one of the cases expressly mentioned in sect. 223. Here Mortimore well knew, as he admits, that he was unable to meet his engagements without the assistance of a firm whose stability he had reason to doubt. He knew that he could not pay his debts out of his own assets. The fresh obligations were therefore contracted without reasonable expectation of being able to pay.

* 605 * *Sir H. Cairns*, in reply. — The respondents admit that the Act is not imperative, but that the Court has a discretion. They say, however, but there was no excuse for Mortimore going on with a losing trade. Now it is of the essence of trade sometimes to gain and sometimes to lose, even for a long period. As to his continuing trade while insolvent, his case is quite different from that of a banker. A banker who is insolvent ought to stop, for no turn of the market can set him right; but a man with a large stock in trade may be restored to solvency by a favourable change in the market. Mortimore, therefore, might reasonably expect to retrieve his affairs. He went on obtaining, in a legitimate way, assistance, of which he had every reason to expect the continuance. The observations in *Ex parte Rufford* justify his conduct. It would be ruinous to hold that a trader must stop because he is temporarily insolvent. The statute does not speak of a trader delaying the presentation of his petition after he is unable to meet his engagements, but “longer than was excusable.” In many cases of merely civil liability a person must be treated as having known what, with reasonable diligence, he might have known; but this is a penal enactment, and the *animus* is to be looked to. In the certificate clauses, the simply not keeping books, which is a worse offence than not taking stock, is not struck at,

(a) 4 De G. & Sm. 25.

(c) 2 De G., M. & G. 234.

(b) 4 De G. & Sm. 29.

but only the not keeping books with intent to conceal the true state of the trader's affairs. As to the bills, they are not to be considered accommodation bills. They did represent real transactions. The drawing the bills for fractional sums, therefore, did not involve a representation of any thing that was untrue. As to the renewals: where bills are drawn against goods, it is quite the ordinary course to renew until the goods are sold. As to the dealing with the Liverpool house, Mortimore considered the two houses as in substance one. I do * not argue for * 606 Mortimore alone. The question interests the creditors much more than him; and, the case being clear of fraud, the Court will pay more regard to the wishes of the great body of creditors.

THE LORD CHANCELLOR. — I am of opinion in this case that the order of the commissioner ought to be reversed; but by no means upon the ground that *Sir Hugh Cairns* has last endeavoured to support; namely, that the dealings between Mortimore and Streatfield & Co. were quite regular, mercantile, and unexceptional. I think that they are very much to be censured; for, in my opinion, although the bills were not all accommodation bills, and there were mercantile transactions between the parties, the bills generally were drawn, not in respect of business transactions, but with a view to obtain credit, and that fictitiously. Great mischief has arisen and must arise from such a course of dealing. But I do not think that the order can be supported, either upon the ground which was taken by the learned commissioner, or upon any other of the grounds in respect of which the commissioner, under the 223d section of the Bankrupt Law Consolidation Act, may declare the petitioner a bankrupt, instead of allowing the estate to be administered under an arrangement between him and his creditors.

The commissioner proceeded upon the ground, that it was shown to him that the petitioner had "postponed the presentation of his petition longer than was excusable." I do not think that there is evidence to support that allegation. It would be fatal to commerce to say, that upon any temporary difficulty a trader must stop payment; it would be ruinous to the creditors as well as to the trader himself. I think that upon this * subject the rule was exceedingly well laid down by the * 607 Lord Justice KNIGHT BRUCE, in the case of *Ex parte Johnson*, which is thus stated in the margin of the case: "A trader

is not bound to leave off trading merely because he is in difficulties; the question in each case being whether he has continued trading after there has ceased to be any reasonable prospect of his retrieving himself." I cannot say, looking to the facts in evidence before us, that this petitioner was inexcusably guilty in continuing to trade. I do not think that it would have been a fit thing for him to have stopped payment and to have surrendered his property to his creditors in the year 1857. That would have been very detrimental to their interests, and at that time he had a reasonable ground for believing that he should be able to retrieve his circumstances. Nor can I say that he had not reasonable ground for such a belief down to the time when he actually presented his petition. The house with which he had dealings still remained in good credit, and, if the price of leather had risen in the market, he might have been able to discharge all his obligations and to pay all his creditors the full amount of their debts. It is almost admitted that he had no personal knowledge of his insolvency; he positively swears that he did not believe he was insolvent. I do not see that he is contradicted by any clear evidence upon that subject, and it can hardly be right in a case of this nature to apply the rule, that the means of knowledge shall be considered as actual knowledge. If he had taken stock and seen what was the real value of the goods that he had on hand, he must have found that he was in a failing way, and he might have discovered the state of his affairs to be such that it would have been a wrongful act for him to have continued his dealings; but I cannot say that his omitting to do that under the circumstances, might not be excused.

* 608 * If, however, the petitioner had been guilty of any other of the offences mentioned in the 223d section, it would be competent for the opposing creditors to avail themselves of that in support of the order. The ground chiefly relied upon is, that the petitioner contracted debts without reasonable probability, at the time of contracting them, of being able to pay the same. Now if while he went on trading, knowing, as he did, that he could not continue business without the help of Streatfield & Co., he had believed that Streatfield & Co. were insolvent, and would not enable him to meet his engagements, then certainly there would have been no probability of his being able to pay the debts that he contracted; but if they had continued solvent and trade had prospered, he might have been able to pay all his debts, and I do not

see any satisfactory evidence to prove that he did not believe them to be fully solvent and able and willing to give him any amount of assistance with which he might reasonably expect to be able to pay his debts. Here the intention certainly is material. "Without any reasonable probability" refers you to the state of the intentions, of the belief, of the conviction of the debtor. Now I do not find any evidence to show that he at that time doubted that Streatfield & Co. — who remained in good credit down to the moment of their bankruptcy, although it would appear that they were a firm little deserving of it — were a firm deserving the highest credit in the mercantile world ; and if that had been their real condition, then the petitioner would probably have been able to pay all the debts which he had contracted.

An attempt was made to support the order on another ground, namely, that a fraud had been committed, the section authorizing the commissioner to adjudge the petitioner a bankrupt: "if it shall be shown to the satisfaction of the Court by any creditor that the debts * of such petitioner, or any part thereof, * 609 have been contracted by reason of any manner of fraud or breach of trust." Now it was argued, and very ingeniously argued, by *Mr. Roxburgh*, that the fact that these bills taken by the opposing creditors were drawn for fractional sums amounted to a false representation that they were bills drawn upon real transactions ; that if they had been drawn for a round sum, that they would not have been taken or discounted, and that therefore the debt was contracted by a manner of fraud. But that argument would make every negotiation of an accommodation bill a fraud, and I think it is impossible to say that any such rule can be laid down. Accommodation bills are well known in commerce ; they may be lawfully used. They are often sadly abused, and if they could be prohibited it would be a very happy event ; but they do exist, and they are recognized, and every accommodation bill is drawn "for value received" on the face of it, and I believe they are universally drawn for a fractional sum. Then is it to be said that any person who negotiates an accommodation bill and says nothing, but carries it to the broker to be discounted, and receives money upon it, is guilty of fraud, and that he may be indicted for obtaining money under false pretences ? That certainly is wholly untenable, and we cannot on this ground alone say that the petitioner contracted any of his debts by reason of any manner of fraud.

For these reasons, I am of opinion that the order cannot be supported upon the ground that was taken by the commissioner, nor upon any other ground; and that therefore it must be reversed. The commissioner will still superintend, because it is most essential to the due administration of the estates of insolvents and of bankrupts that, there should be a Judge to control the
 * 610 * creditors, and to see that there is no collusion between them and the bankrupt. The creditor has a right to attend the proceedings, and I hope that in this manner justice may be done to all parties.

THE LORD JUSTICE KNIGHT BRUCE. — Upon the materials before us, fraud is, I conceive, altogether out of the question, nor do I understand the learned commissioner to have been of opinion that there was any fraud. Then comes the consideration of contracting debts, in the language of the statute, “without reasonable probability at the time of contract of being able to pay the same.” I agree with the Lord Chancellor, or at least with what I understand to be the Lord Chancellor’s opinion, that that must have been intended to mean without a reasonable probability, reasonably supposed by the trader to exist at the time of the contract that he would be able to pay; and I am of opinion that looking at the property which then actually existed, and at the connection between the petitioner and the London firm and the Liverpool firm, both of which were in good general credit until some time in the summer of last year, and a partner in which houses was his own brother, — I am, I say, of opinion, that he is not shown to have contracted any debt without a belief, reasonably well grounded, that he would be able to pay.

Then comes the question of postponing the presentation of his petition longer than was excusable. It has been said, and I believe accurately, that during two or three years or more, before the presentation of the petition, if he had taken stock and closely looked into his affairs, it would have appeared that his debts exceeded his credits and possessions. He did not do so, and he was to blame for not doing so; but looking at the nature
 * 611 * of his business, and the nature of the connection and transactions between him and the London firm and the Liverpool firm, and the general opinion of their credit, in which he participated, I think that he was in this respect not inexcusably

to blame. I conceive, therefore, that the present is a case in which neither public policy nor public justice nor private justice requires that this petitioner should be a bankrupt.

THE LORD JUSTICE TURNER. — I agree in opinion with the Lord Chancellor and the Lord Justice, that this adjudication cannot be maintained upon the particular ground on which the learned commissioner has rested his decision; for I do not think that a person can be said to have postponed the presentation of his petition “longer than was excusable,” when he has had the means of present help, and has had no reason to doubt that these means were sufficient, and might honestly and justly be applied to the purpose.

Upon the other part of the case, whether these debts were contracted without reasonable probability at the time of the contract of the petitioner being able to pay the same, I am not so well satisfied. The doubt I have felt upon it is, whether the reasonable probability ought to be measured by the help which may be got from friends, and whether it ought not rather to be measured by the means and credit of the party himself, having regard to the extent to which a prudent man, looking to the state of trade and the state of his assets, would trust him. I give no opinion, therefore, upon that part of the case. It is enough to say that my learned brother and the Lord Chancellor agree upon it.

* *Ex parte* WILLIAM ANTHONY FRESTON. * 612

In the Matter of WILLIAM ANTHONY FRESTON, a Bankrupt.

1861. February 8, 9, 13. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The final examination of a bankrupt was adjourned from the 6th of November to the 3d of December. On the 29th of November, the commissioner issued a Ba. certificate, under sect. 257 of the Bankrupt Law Consolidation Act, declaring that the bankrupt was not protected from process against his person. By virtue of this certificate, a creditor sued out a *ca. sa.*, and on the 1st of December arrested the bankrupt. After the 3d of December, the

commissioner issued another Ba. certificate, and by virtue of it, another creditor sued out a *ca. sa.*, and lodged a detainer against the bankrupt.

Held, that the commissioner had no authority to issue a Ba. certificate, before the expiration of the time allowed to the bankrupt for finishing his examination, the privilege from arrest given by sect. 112 of the Bankrupt Law Consolidation Act during that period being absolute, and that the arrest on the 1st of December was therefore illegal.

Held, further, that while the bankrupt was illegally imprisoned under this arrest, he could not be lawfully detained under the second Ba. certificate, though granted after the 3d of December.

THIS was an application by the bankrupt for his discharge from imprisonment, on the ground that his original arrest was illegal, having been made while he was entitled to protection under the provisions of the Bankrupt Law Consolidation Act.

On the 15th of September, 1859, a petition for adjudication was presented against William Anthony Freston in the Court of Bankruptcy for the Bristol district, and on the 17th he was adjudged bankrupt, not being in custody at the time. On the same day he surrendered to the bankruptcy. On the 2d of October, the first meeting under the bankruptcy was held and assignees chosen.

On the 6th of November the second meeting was held, at which the examination of the bankrupt was proceeded with, and * 613 adjourned till the 3d of December. * The bankrupt filed his balance sheet on the 29th of November.

On the 1st of December the bankrupt was arrested by the officers of the sheriff of Middlesex under a writ of *ca. sa.* issued out of the Court of Exchequer at the suit of J. V. Ockford, upon a certificate granted by the commissioners on the 29th of November, at the instance of Ockford, as a creditor, under the 257th section of the Bankrupt Law Consolidation Act.

The bankrupt, on the 3d of December, caused a summons to be served on Ockford, to show cause why the bankrupt should not be discharged out of custody. The case was argued before Baron MARTIN on the following day, and adjourned to the 7th, when his Lordship referred the matter to the Court of Exchequer.

While the bankrupt was in custody a detainer was lodged against him on a *ca. sa.*, which had been issued out of the Exchequer, at the suit of Joseph Chapman, upon a certificate granted by the commissioners on the 3d of December.

On the 11th of January, the bankrupt obtained a rule to show

cause why Ockford's *ca. sa.* should not be set aside and the bankrupt discharged, and also a similar rule as regarded Chapman.

On the 15th of January an order made by Mr. Justice Wightman to charge the bankrupt in execution at the suit of A. M. Bateman and H. Bateman for certain moneys, was lodged with the keeper of the Queen's prison, in whose custody the bankrupt then was. This order was obtained on a certificate granted by the commissioner shortly before the 15th of January, and long

* after the time to which the bankrupt's examination had * 614
been adjourned.

On the 17th of January the rules obtained by the bankrupt came on to be argued in the Court of Exchequer. The Court set aside Ockford's *ca. sa.*, and ordered that the bankrupt should be discharged from custody under it and under Chapman's detainer. (a)

On the 21st of January an application to the Court of Queen's Bench to discharge the bankrupt from custody under the Bateman's detainer came on to be heard, and on the 26th was refused. (b)

On the 30th of January the bankrupt moved before the Lord Chancellor for a writ of *habeas corpus* to bring him up, that he might be discharged out of custody, and the writ was granted.

On the 8th of February the bankrupt was brought up under the writ, and applied for his discharge.

Mr. Gray, in support of the application. — The first proposition I have to support is, that the original arrest was illegal. By the old Bankrupt Act, 5 Geo. 2, c. 30, § 5, the bankrupt was protected up to the last adjourned examination. The question arose whether this statute gave protection when the examination was adjourned *sine die*, and it was decided that it did not. *Ex parte Woods*. (c) The provisions of 6 Geo. 4, c. 16, §§ 117, 118, are not materially different, and *Ex parte Leigh* (d) is in point, as showing that the statute itself, and not the indorsement of the petition, * gives protection till the adjourned examination. The case * 615
now depends on the provisions of the Bankrupt Law Consolidation Act 12 & 13 Vict. c. 106, §§ 105, 112, 113. *Ex parte*

(a) Ockford v. Freston, 6 H. & N. 466.

(b) Bateman v. Freston, 9 W. R. 311.

(c) 1 Gl. & J. 75.

(d) 1 Gl. & J. 264.

Leigh, (a) *Price's Case*, (b) *Ex parte Woods*, (c) and *Re Dalton*, (d) all show that the bankrupt was entitled to protection, and that this was not a good arrest.

Secondly. I contend that, if the original arrest was not good, the bankrupt cannot lawfully be kept in custody under the subsequent detainers. It was said in the Queen's Bench, that the illegality of the arrest lay with the judgment creditors, not with the sheriff, for that the writ was good on the face of it; and so the sheriff was in no default for executing it. That does not make the arrest legal; if there be illegality in the writ, though good on the face of it, there is a right to discharge, though the sheriff has not acted illegally; and an action for false imprisonment will lie against the person who sued out the writ. When the sheriff arrests on all writs in his hands, if one of the writs is bad and another good and the sheriff acts regularly, the arrest is good by virtue of the good writ; but if he acts illegally, as for instance by breaking open a door, the arrest is void, and he is liable to an action. In *Barratt v. Price*, (e) the arrest was void by reason of the illegal act of the sheriff; it was not a case relating to detainer. In *Hooper v. Lane*, (g) one of the writs was bad on the face of it, and the sheriff having arrested on the bad writ alone, the arrest was held bad, though he had good writs in his possession; and a detainer on the good writ was also held void. Here we *616 begin with an illegal arrest; and I *contend that the prisoner is entitled to be discharged from all subsequent detainers. *Viner's Abridgment*. (h)

[*Mr. Coleridge*. — I admit that he is entitled to be discharged from all detainers which are lodged *durante privilegio*.]

I contend that he is entitled to be discharged from all detainers lodged during the custody arising from the illegal arrest. *Ex parte Wilson*, (i) *Ex parte Hawkin's*, (k) *Ex parte King*, (l) *Sidgier v. Birch*, (m) *Ogle's Case* (n) *Ex parte Ross*, (o) *Spence v.*

(a) 1 Gl. & J. 264.

(b) 3 Ves. & Bea. 23.

(c) 1 Gl. & J. 75.

(d) 1 Bal. & B. 130.

(e) 9 Bing. 566.

(g) 6 H. L. Cas. 443.

(h) Tit. "Privilege," B. 26.

(i) 1 Atk. 152.

(k) 4 Ves. 691.

(l) 7 Ves. 312.

(m) 9 Ves. 69.

(n) 11 Ves. 556.

(o) 1 Ron. 260.

Stuart. (a) In *Barclay v. Faber*, (b) a distinction was taken, which is disapproved of in *Ex parte Moore*. (c) In *Barrack v. Newton*, (d) the arrest was held good substantially on the ground that the sheriff arrested on all the writs, there being a good one among them, and the sheriff having acted regularly; whereas, in *Barratt v. Price*, the sheriff had been guilty of irregularity, and the distinction was taken as to detainers. The opinions of the text writers are in my favour. Chitty, Arch. Prac., (e) Archbold's Bankruptcy Law, by Flather, (g) Mont. and Ayr. (h) The Court of Queen's Bench thought it was a hardship on creditors that the privilege of the debtor should be prolonged in this way; but the authorities to which I have referred show, as I submit, that where the arrest is invalid there cannot be any valid detainer.

Mr. Coleridge, for the detaining creditors. — I contend, in the first place, that the bankrupt was *not privileged *617 from arrest under the 112th section; and, in the next place, that, if the privilege ever existed, the detainers, being lodged after the period at which the protection indisputably had expired, were perfectly good, though, had they been lodged while the privilege continued, they would have been void. The authorities cited are cases occurring under a different state of the law. They turn upon 5 Geo. 2, c. 30, § 5, and 6 Geo. 4, c. 16, §§ 117, 118. Under these statutes, all procedure was under a summons from the commissioner; and any attempt to arrest the bankrupt was a breach of the privileges of the Court, and was to be repressed with a high hand, as a contempt of Court. The Court had a right to the attendance of the bankrupt, and the privilege was grounded on that. The Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, § 112, proceeds on quite a different principle, and introduces, "as the Court shall by indorsement appoint." It thus gives the commissioner power to refuse protection, and here the commissioner has refused it. *Ex parte Stanton*, (i) *Re Cowgill*. (k) These cases show that the jurisdiction of the commissioner to refuse protection is not limited by the 256th section.

(a) 3 East, 89.

(b) 2 B. & Ald. 743.

(c) Buck, 521.

(d) 1 Q. B. 525.

(e) Vol. 1, p. 742.

(g) Page 374.

(h) Book 7, p. 442 (2d edit.).

(i) 1 De G., M. & G. 224.

(k) 20 L. J., Q. B. 300.

The word "further," in sects. 256, 257, can hardly be explained, except by supposing the commissioner to have a discretion. On the ground, therefore, that the commissioner had jurisdiction to decide whether the bankrupt should have protection, and exercised it by deciding that he should not, I contend that the arrest was legal.

But suppose the arrest illegal; I admit that, in that case, if the privilege continued, all detainers during its continuance would be void; and so, if there were an absolute personal privilege * 618 like that of a member of * Parliament. But here there is no general privilege, the privilege of a bankrupt being only particular. *Tidd's Practice*, (a) *Anderson v. Hampton*, (b) *Kenyon v. Levi Solomon*. (c) The privilege is that the bankrupt's personal freedom is not to be interfered with, so as to disturb the proceedings in bankruptcy.

[THE LORD CHANCELLOR. — Is it not the policy of the bankruptcy law to protect him completely during the proceedings, so that he may prepare for his final examination?]

The reason for the privilege ceases when the Court of Bankruptcy thinks the privilege may be dispensed with. *Grace v. Bishop*. (d) The cases cited on the other side do not go far enough to support the application. In *Ex parte Hawkins*, the detainer came in before the bankrupt's discharge, he having been arrested in returning from the Court: the privilege there continued till he got back. In *Ex parte King*, (e) the arrest was made during attendance on the Court, and the case was put by Lord ELDON on the ground of contempt of Court. *Ogle's Case* (g) was a clear case. In *Arding v. Flower*, (h) the case of a bankrupt is put on the same ground as that of a witness attending a Court. He must be protected, that the course of the administration of justice may not be interfered with. *Ex parte Johnson*, (i) goes on the ground, that it is a contempt of Court to arrest the bankrupt while the Court requires his attendance. In *Ex parte Ross*, (k)

(a) Page 201 (9th ed.).

(b) 1 B. & Ald. 308.

(c) 1 Cowp. 156.

(d) 11 Exch. 424.

(e) 7 Ves. 312.

(g) 11 Ves. 556.

(h) 8 T. R. 534.

(i) 14 Ves. 36.

(k) 1 Rose, 260.

the privilege is rested on the ground on which I put it. *Ex parte Leigh* (a) is explained in the same way. In *Ex parte Weight*, (b) a detainer was held good, on grounds similar to those now urged. * One observation applies to all the cases cited * 619 against us, that the detainers were lodged while the bankrupt was still cloaked with the privilege. Here the privilege had ceased. The statutory protection ended on the 3d of December, and no protection had been granted by the commissioner; so, if there had been original arrests, instead of detainers, they would have been good. There is no case deciding that, where an original arrest would have been good, a detainer is bad because the bankrupt has already been illegally arrested. The first writ was good in itself, the sheriff was in no default; and then while the bankrupt is in custody detainers are lodged, which, if original, would have been good.

[THE LORD CHANCELLOR. — Does not the privilege continue till the Bankrupt is discharged from the illegal arrest?]

I submit not. In *Eggington's Case*, (c) a person was arrested on Sunday; while he was in custody, another warrant was lodged under the same conviction, and then another under a different conviction. The second detainer was held good; and the judgment of Mr. Justice WIGHTMAN is very much in point in the present case. The distinction is recognized throughout, that where the sheriff has done wrong in the arrest, the detainers are all bad; but where he has done no wrong, they may be good.

[THE LORD CHANCELLOR. — If the arrest is illegal, what difference can it make, whether the sheriff or the creditor is the party to blame?]

The distinction is recognized and supported by authority: Archbold's Practice, (d) *Barratt v. Price*, (e) *Robinson v. Yewens*. (g) These cases were examined in *Hooper v. Lane*, (h) which clearly recognized the distinction.

(a) 1 Gl. & J. 264.

(b) 2 Gl. & J. 202.

(c) 2 El. & Bl. 717.

(d) Page 723.

(e) 9 Bing. 566.

(g) 5 M. & W. 149.

(h) 6 H. L. Cas. 443.

* 620 * The Lord Chancellor, at the close of the argument for the detaining creditors, said, that a reply would not be required on the question whether the original arrest was illegal.

Mr. Gray, in reply. — I contend that while the bankrupt was in custody under an illegal arrest, he could not be detained.

[THE LORD CHANCELLOR. — On what authority do you rely? In most of your cases there was a continuing privilege.]

In *Ex parte Moore* (a) there was no privilege at all; the illegality of the arrest arose from the fact of its being made on behalf of a creditor who had proved. Here it is said the privilege is gone, but that cannot put the bankrupt in a worse position than a person who never had any privilege. That case must go on the principle that a right to be discharged when it has once accrued cannot be taken away by detainer. In *Ex parte Ross*, (b) it is said, that the arrest alone gives efficacy to the detainer. If then the arrest be bad, the detainer must fall with it. *Barratt v. Price and Hooper v. Lane* were not cases of detainer, the question was, whether there was a good arrest. *Eggington's Case* (c) went on the ground that the prisoner had ceased to be in the custody of the sheriff, and was in an entirely different custody before the detainer which was held was lodged. In *Robinson v. Yewens*, (d) *Sloman* filled two characters, and the Court treated him as being a stranger to the sheriff *quoad* the first custody. The question was, whether there was a good arrest, and this was the sole question in all the cases cited against me, except *Barclay v. Faber*, (e) and

* 621 * the conclusion come to in that case was disapproved of by Lord ELDON in *Ex parte Moore*. (a)

Judgment reserved.

February 13.

THE LORD CHANCELLOR. — If upon this application we should decide in favour of the bankrupt, there can be no doubt that he might again be arrested lawfully, after he has once fully recovered

(a) *Buck*, 521.

(d) 5 M. & W. 149.

(b) 1 *Rose*, 260.

(e) 2 B. & Ald. 743.

(c) 2 El. & Bl. 717.

his liberty; and he may entertain the fraudulent purpose imputed to him of absconding from his creditors: but we are bound to inquire whether his present imprisonment is lawful, and, if it is not, to order him to be discharged.

The first question which arises is, whether he was lawfully arrested on the 1st of December, 1860, under the Ba. certificate granted by the Commissioner on the 29th of November, although the time for his last examination had been regularly adjourned from the 2d of October to the 3d of December. If this arrest was lawful, no objection can be made to his subsequent detention.

On this question fortunately there is no difference of opinion in the Superior Courts, and I think that no reasonable doubt can be entertained that the imprisonment was unlawful, notwithstanding that it is said to have been according to the practice of the Commissioners of Bankrupts. By section 112 of 12 & 13 Vict. c. 106, it is enacted, that "the bankrupt shall be free from arrest or imprisonment by any creditor, in coming to surrender, * during the time by this Act limited for such surrender, * 622 and for such further time as shall be allowed him for finishing his examination." It is discretionary in the commissioner to enlarge the time for finishing the examination, but during any enlarged time given for this purpose, the bankrupt is absolutely privileged from arrest by a creditor: that he may prepare for his examination and appear at the time and place appointed for finishing it. After his examination is finished, the commissioner may still protect the bankrupt for a further time, until his certificate is obtained; but this is to be by indorsement upon the summons at the discretion of the commissioner. Reliance was placed on the expression in section 113, "if the bankrupt shall after his surrender, and while protected by the Court, be so arrested," he shall be discharged on producing his protection, the inference being that there is no privilege from arrest without protection expressly given by the Court. But the Act of Parliament draws a well-marked distinction between the time for the surrender and examination, and the time given after the examination is finished, or the examination is adjourned *sine die*.

By section 257, which regulates the granting of Ba. certificates for arresting the bankrupt, there is no power given to grant a certificate pending the time allowed to the bankrupt for passing his examination.

Therefore, this certificate granted on the 29th of September, pending the time allowed to the bankrupt to finish his examination, was granted without authority, and the arrest under it on the 1st of December was unlawful.

Mr. Coleridge, in his able argument, cited *Stanton's* * 623 *Case* as an authority in his favour; but when the report* of that case is examined, it will be found that the certificate was not granted until the last examination had been adjourned *sine die*, when the privilege from arrest had expired.

Assuming the arrest on the 1st of December in the present case to have been unlawful, we come to the question on which the Court of Queen's Bench and the Court of Exchequer have deliberately differed: "Whether, while the bankrupt was illegally imprisoned under this arrest, he could be lawfully detained under *Ba.* certificates granted to other creditors after the 3d of December, when the time for finishing his examination had expired."

I must say, that both on principle and authority the judgment of the Court of Exchequer seems to me to be preferable.

Here is a personal privilege — an immunity from arrest — given by Act of Parliament during a specified time, for a specified purpose; and it is of the highest importance to the pecuniary interests and to the character of the individual privileged that this privilege should be respected. When he is beginning to examine his books in his counting-house, and preparing to show that, not by dishonesty or extravagance, but by unforeseen events, over which he had no control, he has been unable to fulfil his commercial engagements, — hoping to be able at the time and place appointed by the Court for his examination to make this apparent, — he is illegally arrested, cast into prison and detained there, under colour of a *capias ad satisfaciendum*, till the time for passing his last examination has expired, ought it to be permitted that this imprisonment shall be indefinitely continued by virtue of a certificate sub-

* 624 sequently obtained by other creditors,* — perhaps on the ground that he did not duly appear to pass his last examination?

Mr. Coleridge truly urged, that the time of privilege expressly given to the bankrupt for his last examination had expired before the writ of *ca. sa.* under the subsequent certificates had been lodged by way of detainer; but I must question his proposition that if, under process of law illegally sued out and acted upon, a

person is deprived of a privilege from arrest given him by law for a certain period and for a particular purpose, he may, without ever having been restored to liberty, be confined in prison for an indefinite time, under process sued out after the expiration of the period for which he was privileged from arrest, — when, had it not been for the illegal arrest, probably this legal process could not have been executed. Take the case which was put during the argument. A member of the House of Commons on the fortieth day after the prorogation of Parliament is arrested for debt when he has nearly reached his dwelling-house in a distant country, and he is lodged in gaol: could he, be lawfully detained under a *ca. sa.* sued out and lodged with the gaoler on the forty-first day? I cannot doubt that on the first day of the next session of Parliament the House of Commons would order him to be discharged, and I think that meanwhile a similar order would be made by a Court in Westminster Hall upon a writ of *habeas corpus*. It is said, that if the privileged person is seized and detained by violence, without colour of legal process during the whole period of privilege, he might at the moment when the period of privilege expires be lawfully arrested by a creditor unconnected with this violence. But there is evidently a wide distinction between an imprisonment without colour of legal process, where resistance would certainly be lawful, and where an action for damages would certainly * afford compensation, and an imprisonment under colour of * 625 legal process, where the process is legal *ex facie*, and could operate as a justification to the officer who acts under it.

We are told that it would be a great hardship to creditors, if they were delayed in their remedies by the irregular proceedings of others, with which they have no connection. But we must likewise consider the hardship upon debtors, if they are to be deprived of benefits to which the legislature thinks they are in justice entitled.

The creditors are not to suffer from the laches of the debtor in quietly submitting to illegal imprisonment, but no such laches can be here complained of.

The Judges in the Court of Queen's Bench seem to have applied an extraordinary test as to the legality of the detainer, viz., whether or not the sheriff was liable to an action for the first arrest. This consideration may be very material in an action against the sheriff for not arresting, but seems to me to be wholly inapplicable where

the question is between the creditor and the debtor as to the legality of a detainer. Instead of saying that the detainer must be held valid because no action lies against the sheriff, if it be admitted that the arrest was unlawful, although under process that would justify the sheriff, I should rather say that this is an additional reason for entitling the party illegally arrested to his discharge under a writ of *habeas corpus*, because he cannot recover damages by an action against the sheriff for the wrong he has sustained.

I do not think it necessary to dwell further upon the authorities in support of the application, than to observe * that

Lord Eldon over and over again, even when the process for the detainer had been sued out after the time of privilege had expired, held that, the first arrest being unlawful, the detainers must be set aside along with it.

The two authorities mainly relied upon in the Queen's Bench were *Barratt v. Price* and *Hooper v. Lane*, but, with great respect, they do not appear to me to apply. In *Barratt v. Price* the only question was, whether the first arrest was good, and it was held that the sheriff having illegally arrested a defendant in one action he cannot detain him in another. *Hooper v. Lane* was an action against the sheriff for not arresting under a *capias ad satisfaciendum*, and here again the question was, whether, there having been a detainer, the first arrest was good. In both these actions it was most material to consider whether the first arrest was good and whether the sheriff was liable to an action for the first arrest; but the liability of the sheriff to an action for the first arrest cannot surely be the test as to the right of a party to be discharged out of custody, who has been deprived of his liberty, in violation of a privilege which the law of the land had conferred upon him.

Eggington's Case, (a) (to which I referred when Mr. Gray first moved for this writ of *habeas corpus*), is more closely in point, but there the privilege from arrest was not of a personal nature, nor given with a view to the benefit of any individual or class of individuals, and it could not be considered that the first illegal arrest on a Sunday, could in any way have contributed to the liability of Eggington, to be detained under the *ca. sa.*

Indeed it has been argued here, that the arrest of a
* 627 * bankrupt privileged from arrest is merely to be considered

(a) 2 EL. & BL. 717.

as a contempt of the Court of Bankruptcy, but I am of opinion that it is a violation of a personal privilege conferred upon him by law, to enable him to perform important duties to his creditors and to himself, and that having been so arrested, if he is not guilty of laches, he is not liable to be arrested or detained under civil process till he has been once set at liberty from the illegal imprisonment.

I therefore think, that this Court should now make an order for the discharge of the bankrupt as prayed.

THE LORD JUSTICE KNIGHT BRUCE. — The bankrupt's last examination began or was continued but was not finished on the 6th of November last, when the learned commissioner adjourned it, not *sine die*, but to the 3d of December following, nor by any judgment, or adjudication, or memorandum, or certificate of the learned commissioner was the bankrupt on the 6th or before the 29th of November deprived or expressed to be deprived of protection; and he must be taken, as I conceive, to have been entitled to protection during the whole interval between the 6th and the 29th of November, and subject to the question of the effect of what took place on that day until the 3rd of December, the time to which the last examination was adjourned. The bankrupt, after the adjournment of the 6th of November, was not required, except by the terms of that adjournment, to appear nor appeared before the learned commissioner, and having on the 1st of December been arrested by the sheriff on a writ of execution, issued as by force of a certificate against him, which, as under the 257th section of the Bankrupt Law Consolidation Act, 1849, was granted and signed by the learned commissioner on the * 29th of Novem- * 628
ber (without having, after the adjournment of the 6th November, heard or summoned him), the bankrupt has ever since that arrest continually been imprisoned under it. I think that the certificate was not, and that therefore the writ of execution was not authorized by law in the circumstances that I have mentioned. But the bankrupt did not attend on the 3rd of December according to the adjournment, and there have been at least two certificates against him, as under the 257th section granted and signed by the learned commissioner since that day, and writs and detainers under them have been issued and lodged against him upon those certificates. The arrest, however, and his imprison-

ment under and by means of it, which has been continued ever since the time when on the first of December it took place, disabled him from attending on the 3d of December to have his examination proceeded with, and it appears to me that the imprisonment was so occasioned and has been of such a kind, as to render each of the detainers of no effect, and that the bankrupt is entitled to be discharged.

The Lord Justice TURNER concurred.

* 629 * *Ex parte* JOSEPH NEALE M'KENNA, ARTHUR GEORGE CHAPMAN, WILLIAM HINCKES COX, and CHARLES LEE.

In the Matter of THOMAS LAURENCE and WILLIAM MORTIMORE, Bankrupts.

Case of THE CITY BANK.

1861. January 31. February 8, 13. Before the Lord Chancellor Lord CAMPBELL and the Lords JUSTICES.

A partner continued with the bankers of his firm, who were also his private bankers, a deposit of the certificates of some railway shares which he had originally purchased in his own name, with a memorandum to the effect that the object of the deposit was to secure sums of money due on promissory notes of the partner discounted by the bankers, and any future sums in which he might become indebted to them. The firm, as between themselves and the partner, had previously to the date of the memorandum adopted the purchase of the shares. The moneys raised by the discounts were employed for the purposes of the firm, who made to the bankers payments on account of the money due on the promissory notes. On the firm becoming bankrupts, with a large balance due from them on their partnership account with the bankers, and a smaller balance due from the partner on his separate account: *Held*, that neither the above state of circumstances, nor the general lien of the bankers, entitled them to hold the shares as a security for the balance due from the firm.

THIS was the appeal of the assignees of the above bankrupts from a decision of Mr. Commissioner HOLROYD, holding that the City Bank, who were the respondents, were entitled to a charge

or lien on certain railway shares for the whole amount due to the respondents from the bankrupts on their joint account, the appellants submitting that, by the terms of the contract for security, it was confined to the amount due from the bankrupt William Mortimore separately.

The bankrupts Thomas Laurence and William Mortimore carried on business in London as leather dealers, in partnership, under the style of Streatfield, Laurence, & Co. On the 25th April, 1856, 1000 shares in the Staines, Wokingham, and Woking Railway Company were standing in the names of Sir Robert Walter Carden and Peter Bell, two of the directors of the City Bank, by way of mortgage to secure money due to the bank * from a customer, with a power of sale. On the 6th of * 630 April, 1857, William Mortimore agreed to purchase the shares from the bank on the terms expressed in the following memorandum:—

“I agree to take the 1000 shares in the Staines, Wokingham, and Woking Railway Company which have been placed in your hands as collateral security for an advance by one of your customers at the price of 10*l.* per share, provided you are willing to take payment as follows, viz., I propose to leave the above with you as they now stand in the names of your trustees, and also certificates for 150 shares which I have standing in my own name, and which I will transfer to you if called upon to do so, making in all 1150 shares, representing at 10*l.* per share 11,500*l.*, which I lodge with you as collateral security for the due repayment of my acceptance now given to you at four months’ date for three-fourths of the whole amount viz. £8,625 0 0

“In respect of which, after allowing your discount

thereon to the amount of	191 19 9
------------------------------------	----------

“I take credit in the sum of	8,433 0 3
--	-----------

“And now hand you a check for	1,566 19 9
---	------------

“Thus completing the payment of	£10,000 0 0
---	-------------

“W. MORTIMORE.”

On the 8th August, 1857, William Mortimore signed and addressed to the manager of the City Bank another letter, which was as follows:—

“ With reference to my letter to your bank dated the 6th April 1857, as annexed, I beg to say that having agreed to take of you a further number 100 shares in the Staines, Wokingham, and
 * 631 Woking Railway Company * on similar terms to those on which I took the 1000 shares mentioned in my above-noted letter, I now deposit the shares standing in the name of your trustees, and 150 in my own name, together 1250 in number, with your bank, as collateral security for the due payment of my promissory note for 9000*l.* maturing the 11th December, which has this day been discounted by you ; and in the event of my failing duly to pay such note at maturity, I authorize you forthwith, or at any time afterwards, to realize such shares, or any part thereof, and I engage to pay you the amount of any deficiency which may result to you therefrom.

“ W. MORTIMORE.”

On the 8th November, 1858, 8400*l.* part of the sum of 9000*l.* secured by the promissory note mentioned in the last memorandum had been paid off by weekly instalments of 100*l.* each, which had in the separate account of William Mortimore with the bank been carried to his credit in an account called the deposit account of William Mortimore.

On the same day he sent to the bank the following letter or memorandum : —

“ Please to receive herewith my check for 4280*l.* for payment in full of 214 preference shares in the Staines, Wokingham, and Woking Railway Company ; and in consideration of your discounting my promissory note for 1000*l.* due on the 11th February, 1859, I hereby engage to deposit the certificates for the above shares with you, and to make a transfer of the same into the names of two of your trustees, such certificates together with the securities described at the back hereof to be held by you as collateral security for the aforesaid promissory note, or for any other sum or
 sums of money in which I am now or may hereafter become
 * 632 indebted to * you ; and you are hereby fully empowered to sell the before-mentioned securities should the above promissory note or any other advance not be regularly paid at maturity.

“ W. MORTIMORE.”

On the 11th October, 1859, he addressed the following letter to the manager of the bank:—

“Please to discount my promissory note for 5000*l.* due the 14th January, 1860, and hold certificates for 1100 ordinary shares, and 214 preference shares transferred to your trustees Sir Robert Walter Carden and Peter Bell, Esq., as collateral security for the same or for any sum or sums of money in which I may now be or may hereafter become indebted to you.

“W. MORTIMORE.”

On the 31st July, 1860, Thomas Laurence and William Mortimore were adjudged bankrupts. At the date of the adjudication there was owing to the City Bank from William Mortimore 6100*l.*, and from the firm above 45,000*l.*

The grounds on which the commissioner held that the above securities, notwithstanding the form in which they were expressed, applied or extended to the latter balance, were, that, upon the evidence, the firm appeared to have adopted the purchase of the railway shares before the date of the memorandum of deposit, and to have paid the purchase-money for them, and that the moneys borrowed on the promissory notes and all the advances made on the security of the shares were in truth applied to the use of the firm, Mortimore being in fact merely the agent of the firm in the dealings in question, so that the words “any other sums of money in which I am or may hereafter become indebted” must * mean moneys of the same kind as those specified, viz., * 638 moneys advanced for the benefit of the firm, and the commissioner considered the case as coming within the authority of *Chuck v. Freen.* (a) The application upon which the order under appeal was made was a petition of the City Bank to the Court of Bankruptcy for the usual equitable mortgagee’s order, and the order under appeal declared that the shares were a security for the balance due to the bank from the firm.

Mr. Bacon and *Mr. De Gez*, for the appellants. — The extent of the security is by the terms of the memoranda clearly confined to Mortimore’s separate debt. The bank never contracted for any

security for the debt due from the firm, and there is no ground for giving them such security. In *Chuck v. Freen* (a) the memorandum referred to the dealings in respect of which the security was requested, and those dealings had been exclusively with the firm. Although the moneys specified in the memorandum may have been applied to the use of the firm in the present case, that circumstance would not make the firm debtors to the bank in respect of the advances, they having been made on the credit of the separate promissory notes.

They also referred to *Ex parte Freen*, (b) *Siffkin v. Walker*, (c) *Ex parte Emly*, (d) *Emly v. Lye*. (e)

Mr. Selwyn and *Mr. Watkin Williams*, for the respondents. — It is unnecessary to go into the transactions prior to that of the 8th November, 1858. At that time the shares belonged to * 634 the firm, and Mortimore had no * authority to pledge them for his separate debt. The case of the appellants is, that Mortimore committed a fraud on his partner, and that they who claim under him can take advantage of the fraud. All that Mortimore could properly do was to pledge the shares to secure the debt due from the firm, and having regard to this fact, and to the fact of the moneys mentioned in the memoranda having been advanced for the use of the firm, the true construction of the general words is to apply them to the balance due from the firm. Mortimore was acting as the agent of the firm, and whether the respondents knew that at the time is immaterial, as a person dealing with an agent may adopt the true instead of the apparent contract if he think fit. The cases are collected in *Lindley on Partnership*, (g) who draws from them this conclusion: "If, therefore, one partner enters into a contract care must be taken in determining whether the contract is confined to him or extends to him and his copartners, not to place too much reliance upon the terms of the contract. For supposing a contract to be entered into by one partner in his own name only, still, if in fact he was acting as the agent of the firm, his copartners will be in the position of undisclosed principals, and they will therefore be liable to be sued on the con-

(a) 1 Moo. & M. 259.

(d) 1 Rose, 61.

(b) 2 Gl. & J. 246.

(e) 15 East, 7.

(c) 2 Camp. 308.

(g) Page 272.

tract, although no allusion is made to them in it." *Chuck v. Freen* goes beyond the present case, for the deeds there related to the separate estate only, and yet were held to be a security for the debt of the firm, though the memorandum was framed in the singular number as here. But, independently of any express contract, the City Bank were the bankers of the firm, and in that character held in their hands the certificates of the shares which belonged to the firm, so that they had a general lien on the shares for the balance due from the firm.

*They referred to *Beckham v. Drake*, (a) *Bottomley v. Nuttall*, (b) *Garrett v. Handley*, (c) *Thompson v. Davenport*. (d) * 635

Mr. De Gex, in reply.

Judgment reserved.

February 13.

THE LORD CHANCELLOR. — I am of opinion that the order appealed against, in as far as it declares that the "City Bank is entitled to hold and retain the shares mentioned in the two memorandums dated 8th November, 1858, and 11th October, 1859, signed by the bankrupt Mortimore as security for any debt due to the City Bank from the bankrupts Laurence & Mortimore jointly," ought to be reversed. This depends entirely upon the contract entered into between the parties by these memorandums. In construing them, it must be borne in mind that the City Bank had an account with Laurence & Mortimore jointly, and various transaction with their firm, and that the City Bank had a separate account with Mortimore, and various separate transactions with him in purchasing shares, and discounting bills of exchange, and promissory notes.

It is likewise material that to the knowledge of the City Bank the shares in question were at the time of the deposit the separate property of Mortimore.

We are then to say, from the written documents, what * was the real intention of the contracting parties. Can it * 636

(a) 9 M. & W. 79, and 11 M. & W. 315.

(c) 4 B. & C. 664.

(b) 5 C. B., N. S. 122.

(d) 9 B. & C. 78.

be supposed that the City Bank believed that this was a transaction between them and the partnership, or that they ever gave credit to the partnership in respect of these shares? If there had been a separate debt due to them from Mortimore equal to the value of the shares, would not the City Bank have had a lien on these shares for the full amount of the separate debt, whatever the state of the account might have been between them and the partnership?

On the 8th of November, 1850, Mortimore gives the City Bank a check for 4280*l.* in payment of shares purchased from them, discounts with them a promissory note of his own for 10,000*l.* due 11th February, 1859, and deposits with them the certificates for the shares. In the memorandum addressed by him to the City Bank, stating the transaction and describing the certificates, he says: "To be held by you as collateral security for the aforesaid promissory note, or for any other sum or sums of money in which I am now or may hereafter become indebted to you."

On the 11th of October, 1859, Mortimore discounts with the City Bank a promissory note of his own for 5000*l.* due January 14th, 1860, and in the memorandum stating this transaction addressed to the City Bank, referring to the certificates for shares, he says: "Hold them as collateral security for the same promissory note, or for any sum or sums of money in which I may be or may hereafter become indebted to you."

No language could be devised more expressly and pointedly to extend the security to any separate debt due to the City Bank from Mortimore, and to confine it to such separate debt.

* 637 Can it make any difference in the construction of this written contract, that before the bankruptcy of Laurence & Mortimore the shares had become the joint property of the partnership, that the money raised by the discounts was applied by Mortimore to a purpose in which he and Laurence were jointly interested, and that at the time of the bankruptcy there was a large unsecured debt due to the City Bank from the partnership? Down to that time the partnership had remained in high credit, and the City Bank had asked for no security for the joint debt, although this greatly exceeded the value of the shares pledged on discounting the separate promissory notes of Mortimore. Indeed, it is quite clear that the City Bank had not regarded the shares as a security for the joint debt, although they now seek, in respect of

these shares, to obtain an advantage over the other unsecured joint creditors of the partnership.

Assuming that at the time of the bankruptcy the shares had become the joint property of the partnership, and that the money obtained by the discounts was applied to partnership purposes, it cannot be said that a contract was entered into by which the shares were not to be a security for the separate debt of Mortimore, and were to be a security for the joint debt of the partnership. Mortimore had no authority to enter into such a contract, and he cannot be supposed to have intended to do so. The money was advanced to Mortimore on his own separate credit, and his application of it to partnership purposes would be a matter merely between him and his copartner. It is quite clear that the City Bank would have been entitled to apply the security to the promissory notes on which Mortimore, and Mortimore only, was liable, and to any other separate debt due to them from Mortimore. But it cannot operate doubly as a * security for the separate * 638 debt of Mortimore and for the joint debt of Mortimore & Laurence.

No authority has been cited which would justify the forced construction of the contract contended for by the respondents, and the construction contended for by the appellants seems to me so clearly to rest on principle, that I do not think it necessary to refer to *Emly v. Lye*, or any of the authorities which might be cited in support of it.

The attempt to support the claim upon the general lien of bankers is answered by the fact, that there was here a written contract between the parties by which the extent of the lien was expressly defined and limited.

THE LORD JUSTICE KNIGHT BRUCE. — I am also of the same opinion.

THE LORD JUSTICE TURNER. — I am of the same opinion. I think that the learned commissioner, in whose judgment I take the liberty of saying I have very great confidence, has fallen into an error in considering this case to be governed by the case of *Chuck v. Freen*. (a) In that case the evidence showed that the

(a) 1 Moo. & M. 219.

dealings to which the memorandum referred were partnership dealings, and thus put a construction upon the words "for me" contained in that memorandum; but in this case the evidence

* 639 shows that there were both separate and partnership * dealings, and there is nothing by which to construe the memorandum beyond the words in which it is expressed, and which clearly apply to the separate and not to the partnership dealings. The argument on the part of the respondent, that the shares having become the property of the partnership, the deposit must be taken to have been on the joint and not on the separate account, and that the language of the memorandum being thus altered, as to the party depositing, must be altered throughout, thus rendering the debt secured the partnership debt, and not, as it is expressed, the separate debt, seems to me to be untenable in two points of view. First, that it disregards the fact that one of the parties to the contract, the respondents, did not even know of the partnership title, and dealt with the transaction as a transaction on the separate account; and, secondly, that it disregards also the distinction between the right and liabilities of the parties to the contract, and the extent of the contract itself,—a distinction which, in cases of this description, ought, as it seems to me, to be carefully kept in view. I agree, therefore, that this order must be discharged, and that the order must be to declare the respondents entitled to hold the shares as a security only for the 1373*l.* and 5000*l.* and interest, with the usual consequential directions; and I think that the respondents must pay the extra costs occasioned by their more extended claim before the commissioner, but that there should be no costs of the appeal.

[500]

* *Ex parte* ARTHUR DUFFIELD KIDD. * 640

In the Matter of ARTHUR DUFFIELD KIDD
(an arranging debtor).

1861. March 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A sequestration had issued against a debtor in Scotland, where he resided and carried on business, and creditors (also residing in Scotland), proved and received dividends under the sequestration. The debtor did not obtain any order of discharge, and more than six years from the payment of the last dividend, he petitioned the Court of Bankruptcy in London for protection, having in the mean time carried on business in England, and a proposal for payment of a composition secured by inspectorship trusts was assented to and confirmed according to the provisions of the Bankrupt Law Consolidation Act, 1849: *Held*, that the Statute of Limitations was a valid objection to the claim of the Scotch creditors to be paid a composition on the unpaid portion of their debt under the inspectorship, the sequestration being held not to create a trust of subsequently acquired property for the purpose of taking the debts provable under it out of the statute.¹

THIS was an appeal from a decision of Mr. Commissioner FONBLANQUE in the matter of a petition for arrangement filed by the appellant, under the Bankrupt Law Consolidation Act, admitting a proof of a debt which the appellant contended was barred by the Statute of Limitations. One of the respondents, John Gilmour, of the firm of Gilmour & Co., Glasgow, by his deposition in support of the proof stated, that in 1836 the appellant resided at Kelso, where he carried on business as a draper. That he was at that time indebted to the deponent's firm in 104*l.* 10*s.* 5*d.* for goods sold and delivered, and also upon an acceptance. That in June, 1836, he absconded from Kelso, whereupon a sequestration was on the 17th of June issued, under which the respondent and his partner proved and received two dividends; but that there still

¹ See *Don v. Lippmann*, 5 Cl. & Fin. (Am. ed.) 1, and cases in note to this point; *Paine v. Drew*, 44 N. H. 306; *Thibodeau v. Levassuer*, 36 Maine, 362; *Pearsall v. Dwight*, 2 Mass. 84; *Byrne v. Crowninshield*, 17 Mass. 55; *Bulger v. Roche*, 11 Pick. 36; *Le Roy v. Crowninshield*, 2 Mason, 151; *Story Conf. Laws*, §§ 577 *et seq.*; *United States v. Donnally*, 8 Peters, 361; *Angell, Limitations* (4th ed.), §§ 65-67.

remained due to the respondent and his partner for principal and interest 122*l.* 5*s.*

Since 1836 the appellant had traded in London under the *641 name of Archibald Duffie. He had now obtained * his discharge under the sequestration. The trustee under it died in 1856, and no successor had been appointed.

On the 1st of October, 1860, the appellant presented a petition to the Court of Bankruptcy in London, for an arrangement with his creditors under the superintendence and control of the Court, and on the 22d of October filed in the same Court a draft deed of inspectorship, with a proposal in the following terms:—

“Proposal for the future payment or the compromise of my debts and engagements. I propose that my affairs be wound up and my assets distributed as quickly as possible by me under the inspection of George Hade of St. Albans, in the county of Herts, straw plait manufacturer, and John Baggallay of Love Lane, in the city of London, warehouseman, and that a deed of inspection providing for the winding up and distribution of my estate should be prepared, the inspectors being the above named George Hade and John Baggallay, in the terms and to the effect of the draft hereinafter set forth, and that each of my creditors, who shall be bound by the resolution to accept this proposal, shall execute such deed on its being tendered to him for that purpose before the payment of any dividend to him, but shall be bound by the same deed whether he shall execute the same or not; and I propose that the said deed and the moneys to be paid thereunder to my creditors as therein mentioned shall be accepted by the said creditors in full satisfaction and discharge of their respective debts.”

This proposal was duly assented to and confirmed.

*642 On the 4th December, 1861, being the day on * which the second sitting was held under the petition, the commissioner made the order under appeal, which directed, that the proof of Messrs. Gilmour & Co. should be admitted for the amount of the original debt and interest thereon from the date of the sequestration in Scotland, after giving credit for all dividends receivable under the sequestration, Messrs. Gilmour & Co. undertaking to hand over to the estate any future dividends which they might receive under the sequestration.

Mr. Bacon, Q. C., and Mr. Westlake, for the appellant. — The debt if contracted in England would have been barred, and it can make no difference that it was contracted in Scotland. *Don v. Lippmann, (a) British Linen Company v. Drummond. (b)* The argument that the sequestration created a trust has no application, for it only created a trust of the actual property at the time. Future property could only be reached by a supplemental sequestration, which would not be granted unless where it could be done without injustice to the subsequent creditors. • They referred to 54 Geo. 3, c. 137, §§ 29, 52; 2 & 3 Vict. c. 41, §§ 26, 81; *Tucker v. Hernaman; (c) Christie v. Dowling. (d)*

Mr. Anderson and Mr Bagley, for the respondents. — A Scotch sequestration is of universal operation. It extends to all property and assets, and to all the creditors, and as an English commission or an English insolvency would have removed the statutory bar, so must a Scotch sequestration.

* They referred to *Douglas v. Forrest, (e) Ex parte * 643 Ross, (g) King v. Walker, (h) Sidaway v. Hay, (i) Burge's Com., (k) Re Hemming, (l) Bell's Com. (m)*

THE LORD CHANCELLOR. — The question is whether this debt ought to have been admitted to proof, and I am clearly of opinion that it ought not. We have the admission (which indeed might well be expected from a gentleman of Mr. Anderson's knowledge and candour), that *prima facie* the Statute of Limitations is a bar. There is no doubt about that. It is settled by the case of *Don v. Lippman* and other decisions which have been cited, that, with respect to the limitations of actions, that is a matter of procedure to be governed by the law of the *forum*, and not matter of the construction of the contract to be governed by the law of the place of the contract. Here there is *prima facie* a bar to this claim, for

(a) 5 Cl. & Fin. 1.

(b) 10 B. & C. 903.

(c) 4 De G., M. & G. 395.

(d) 14 Sess. Rep. 191.

(e) 4 Bing. 686.

(g) 2 Gl. & J. 46.

(h) 1 W. Black. 286.

(i) 3 B. & C. 12.

(k) Vol. 3, pp. 912, 917.

(l) Fonbl. Cas. Bank. 34.

(m) Vol. 2, p. 470.

more than six years have elapsed since the debt was contracted and the right of action accrued. What is the reply to that defence? First, that there is a sequestration in another country. Mr. Anderson argued with his usual ability that by law of nations a sequestration, wherever it took place, is a bar to such a defence, and that it suspends the effect of the lapse of time in the country where the party may be domiciled, both in England, Ireland, and Scotland, and indeed all over the world. But there is no foundation in my opinion for supposing that such is the law in England. The law in England has laid down particular periods of time for

* 644 * the bringing of particular actions, and has also prescribed the exceptions to those periods, and when we come to examine the statute we find no exceptions in the English statutes of a sequestration in a foreign country. But then, very properly, the 52d section of Stat. 54 Geo. 3, c. 137, is brought before us. Undoubtedly it was within the power of the legislature at the time of passing that Act to have said, that a Scotch sequestration should bar any defence grounded on lapse of time in England, Ireland, Scotland, or any part of the British dominions. But we find that it has said nothing of the kind. It has only said: [His lordship read the section to the words "as if an action had been raised on the ground of debt against a bankrupt and against a trustee."] There is thus no statute that gives effect to this proof under an English bankruptcy. It was allowed in argument that an action might have been maintained; but it is said that this is a trust. With the greatest respect, however, to what fell from the learned counsel, I consider it a wholly untenable proposition, that a trustee under a Scotch sequestration is to be considered as a trustee in respect of this after-acquired property in England. Therefore, in my opinion, the order of the learned commissioner was a wrong order, and must be reversed.

THE LORD JUSTICE KNIGHT BRUCE. — The debt was incurred in the year 1836. There has been no dividend under the Scotch sequestration since the year 1839. Kidd, the appellant, was residing in England throughout the year 1840; and it has been conceded that an action might have been maintained against him for the unpaid portion of the debt at any period of the year 1840, to which he would have no defence. The consequence is, consid-

ering the lapse of * time that has occurred since the * 645 year 1840, that the debt has been barred ; and it seems to me, therefore, that there is no right to prove in this case.

THE LORD JUSTICE TURNER.—I am of the same opinion, and for the same reasons.

Ex parte JOSEPH NEALE, M'KENNA, ARTHUR GEORGE CHAPMAN, WILLIAM HUNTER COX, and CHARLES LEE.

In the Matter of THOMAS LAURENCE and WILLIAM MORTIMORE, Bankrupts.

Case of THE BANK OF ENGLAND.

1861. July 3. Before the LORDS JUSTICES.

There is no rule that where lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate ; nor, on the other hand, that if they are not bought for the purposes of the partnership business they are not joint estate ; nor does the form of the conveyance settle the question, which must be determined with reference to all the circumstances of the case.¹

One of two partners carrying on the business of leather factor bought lands for the purpose of erecting a residence on part of it, and selling the remainder to a railway company. He offered a share to his partner, who was also desirous of building a house out of town for his residence. The offer was accepted, and the purchase-money paid out of the partnership assets ; but the conveyance was to the partners in separate moieties, each of which was conveyed to the usual uses to bar dower. The partners at their individual expense built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partnership assets : *Held*, that the whole of the land constituted joint estate.

The commissioner having held that part of the land was joint and part separate estate, there was an appeal as regards the latter part within time, and then another appeal as to the former part after the statutory time : *Held*, that the second appeal was a cross appeal, and that a cross appeal may be entered after the statutory time if the original appeal is in time.

THIS case came on upon an appeal and cross appeal against an order of Mr. Commissioner HOLROYD declaring that certain parts

¹ See *post*, 659, and cases in notes.

of some mortgaged property constituted joint estate, and
 * 646 other parts separate estate ; * the assignees under the bankruptcy, who were the appellants in the original appeal, contending that the whole constituted joint estate ; and the Bank of England, who were the mortgagees and the appellants in the cross appeal, contending that the whole constituted separate estate.

The question arose upon the claim of the bank to retain their proof without realizing and deducting the proceeds of their security.

At the sitting for the choice of assignees the proof of the Bank of England had by arrangement been admitted for the full amount of 83,634*l.* 16*s.* 8*d.*, due to them from the bankrupts jointly, but without prejudice to the question whether the value of all or any part of the property comprised in their security should ultimately be deducted from the proof

The bankrupts, Thomas Laurence and William Mortimore, carried on business in London as leather factors, in partnership, under the style of Streatfield, Laurence & Co. They also carried on business at Liverpool, in partnership with a Mr. Schrader, under the name of "Laurence, Mortimore, & Co." Both firms stopped payment on the 2d July, 1860, and all the partners were adjudicated bankrupts on the 21st of that month. The mortgaged property consisted of an estate at Egham, called "The Trotsworth estate," and of certain freehold buildings ; as to the latter of which, however, no question arose upon the appeal, and which were situated in Camomile Street, Bishopsgate Street, called "The Saracen's Head Yard estate." The former estate had been purchased in the year 1854 by the bankrupt Mortimore for 11,000*l.*, but before the conveyance was executed the bankrupt Laurence agreed to join in the purchase.

* 647 * By an indenture dated the 9th of March, 1851, the estate was assured to the bankrupts in fee as joint tenants, and the mortgage debt was assigned to their trustee in trust for the bankrupts as joint tenants. The conveyance was dated the 20th April, 1855, and was made between C. H. Barham (the vendor) of the first part, W. H. Ince of the second part, the bankrupts Thomas Laurence and William Mortimore of the third part, and a dower trustee of the fourth part ; and thereby, after reciting the contract for purchase and that the bankrupts were desirous of having the estate conveyed to them in equal moieties, the estate

was conveyed and assured "as to one equal undivided half-part or share thereof" to the usual uses to bar dower in favour of the bankrupt Laurence; and, as to the other undivided moiety thereof, to similar uses in favour of the bankrupt Mortimore.

The mortgage debt was paid out of the partnership money, and the balance of the consideration for the purchase was similarly paid, the payment in the latter case being made by means of a check drawn in the name of Streatfield, Laurence, & Co., upon the bankers of the partnership, in the following form:—

" London, April 12, 1855.

" Pay Trotsworth estate, or bearer, Burnett & Kean, five thousand one hundred pounds.

" (Signed) STREATFIELD, LAURENCE, & Co.

" 5100*l*."

Both sums were in the partnership-books debited to the account of the Trotsworth estate. During the same year the Trotsworth estate account was also debited and credited with various receipts and payments, leaving a * balance of expenditure * 648 over receipts in respect thereof to the amount of 12,486*l*. 12*s*. 1*d*.

At the time of the purchase, and throughout the whole of the year 1855, each of the partners had standing to the credit of his private account in the partnership books a balance more than sufficient to have paid his share of the outlay in respect of the Trotsworth estate.

At the end of that year the bankrupts granted a lease of part of the estate to a tenant named Whitfield, reserving the right to determine the lease as to specified portions of the demised lands (which might be required for building) on giving a specified notice, on which the lessee was to surrender such portions to the bankrupts, "their heirs or assigns." The rent was reserved to the bankrupts, their heirs and assigns, and the reservation of mines and timber was in similar terms.

Shortly afterwards, each of the bankrupts selected a piece of land, part of the Trotsworth estate, as the site of a dwelling-house for his family, and each expended about 10,000*l*. out of his own pocket in building such dwelling-house.

The mode in which these payments were made was, as regarded

Mr. Bacon and *Mr. De Gex*, for the assignees, in support of the original and in opposition to the cross appeal. — The principle on which the commissioner decided the case as to the Trotsworth estate generally was correct, and it extends equally to the sites of the houses, as to which nothing had been done or had taken place to change their character as joint estate. Perhaps it was in contemplation to change that character, but no agreement of any kind had been entered into for that purpose.

* 652 * They referred to *Ex parte Free*, (a) *Young v. Keighly*, (b) *Ex parte Wheeler*, (c) *Ex parte Hinds*, (d) *Morris v. Barrett*. (e)

Mr. Roundell Palmer and *Mr. Cotton*, for the Bank of England. — The property was not acquired for the purposes of the partnership. In *Ex parte Free*, the decision turned on the fact of the property having been used as joint estate. The question really is, whether the property here was bought or used for partnership purposes. The fair result of the evidence is, that the purchase was a transaction altogether distinct from and disconnected with those of the partnership, and was made for the acquisition of private property for residential purposes. The form of the conveyance is material as to this. The different form of the conveyance of the Saracen's Head Yard property is also material to be considered. The Trotsworth estate was bought for separate purposes, and was from the first intended to be divided. But the moieties are not in the mean time the less separate property because they are actually undivided. The legal estate is vested in separate moieties, and it is for the assignees to prove that it was nevertheless joint property. The separate expenditure on the houses proves the contrary. It could not have been intended that the houses built by the bankrupts for their private residences should be at any time partnership property, and at all events these portions of the estate must be private property. The partnership was one at will, and if this property constituted partnership assets, either partner might have required it to be sold, which could not have been intended.

(a) 2 Gl. & J. 250.

(d) 3 De G. & S. 613.

(b) 15 Ves. 557.

(e) 3 Y. & J. 384.

(c) Buck. 25.

* They referred to *Smith v. Smith*, (a) *Ex parte Ruf- * 653*
fin, (b) *Ex parte Harris*, (c) *Ex parte Yonge*, (d) *Ran-*
dall v. Randall, (e) *Darby v. Darby*, (g) *Wild v. Milne*, (h)
Phillips v. Phillips, (i) *Cookson v. Cookson*, (k) *Houghton v.*
Houghton, (l) *Broom v. Broom*, (m) *Collyer on Partnership*. (n)

Mr. Bacon, in reply.

Judgment reserved.

July 3.

THE LORD JUSTICE KNIGHT BRUCE. — The manner in which the purchase of the Trotsworth estate by the bankrupts was completed, and the transaction and the accounts connected with it were entered and kept in their books before the bankruptcy, amount, I think, to sufficient evidence that the purchase was made on account of their firm, and that the estate formed part of their partnership property; and, notwithstanding the form of the conveyance, I am of opinion that at the time of the bankruptcy the estate continued to be part of their partnership property, subject of course to the incumbrance created in favour of the Bank of England. To a certain extent, therefore, I have the satisfaction of agreeing with the learned commissioner. I respectfully differ from him, however, as to the two villas or dwelling-houses which were built by the bankrupts respectively on parts of that estate. Whatever they or either of them may * have contemplated doing, * 654 there was, I think, no agreement made between them as to any mode of allotting, appropriating, or disposing of both or either of the two villas or dwelling-houses, or dealing with either of them; and I repeat, that, subject to the possibility (not now material) that with respect to the expenditure of each there might have been a right of account between them, the whole estate remained partnership property at the time of the bankruptcy.

(a) 5 Ves. 189.

(b) 6 Ves. 119.

(c) 2 Ves. & Bea. 210.

(d) 3 Ves. & Bea. 81.

(e) 7 Sim. 271.

(g) 3 Drew. 495, 502.

(h) 26 Beav. 504.

(i) 1 Myl. & K. 649.

(k) 8 Sim. 529.

(l) 11 Sim. 491.

(m) 3 Myl. & K. 443.

(n) Pages 84, 91, 92, 93, 2d edit.

THE LORD JUSTICE TURNER. — These are appeals from an order of Mr. Commissioner HOLROYD, which contained amongst other things the following declarations: “ And this Court doth declare that the farm and lands at Egham, forming that part of the aforesaid property called ‘ the Trotsworth estate ’ which is now in the occupation of Thomas Whitfield under the lease thereof granted to him by the bankrupts Thomas Laurence and William Mortimore, and dated the 28th December, 1855, were also the property of the said bankrupts Thomas Laurence and William Mortimore as partners, and formed part of their joint estate at the time of the bankruptcy. And this Court doth declare that the house built on part of the said Trotsworth estate by the said bankrupt Thomas Laurence, and the ground and land occupied therewith by him, were the property of the said bankrupt Thomas Laurence solely, and formed part of his separate estate at the time of his bankruptcy; and further, that the house built on the said part of the Trotsworth estate by the said bankrupt William Mortimore, and the ground and land occupied therewith by him, were the property of the said bankrupt William Mortimore solely, and formed part of his separate estate at the time of his bankruptcy.” The questions raised * 655 by the appeals depend upon whether these * declarations are or are not well founded, and it is unnecessary therefore to enter into the other parts of the order.

One of the appeals is by the Bank of England, complaining of the order so far as it declares the part of the Trotsworth estate in the possession of Whitfield to have been the property of the bankrupts as partners, and to have formed part of their joint estate, and seeking to have it declared that this part of the estate was separate estate of the bankrupts respectively. The other appeal is by the assignees, complaining of the order so far as it declares the houses built by the bankrupts respectively, and the grounds and lands occupied therewith, to have been part of the separate estates of the bankrupts, and seeking to have it declared that these houses, grounds, and lands constituted part of the joint estate of the bankrupts.

The parts of the Trotsworth estate in the occupation of Whitfield and of the bankrupts, respectively, together constituted the whole of that estate. The estate appears to adjoin or be near to a station at Woking, on a line of railway in which the bankrupts were largely

interested. The bankrupt Mortimore seems to have originally agreed for the purchase of the estate ; but soon after he had agreed to purchase it he offered the bankrupt Laurence to share in the purchase, and the bankrupt Laurence accepted the offer. The estate at the time of the purchase was in mortgage for 6000*l.*, and in the month of March, 1855, the mortgage was paid off out of the partnership assets. Afterwards, in April, 1855, the residue of the purchase-money was also paid out of those assets, and the estate was then conveyed to uses in bar of dower, as to one moiety in favour of the bankrupt Laurence, and as to the other * moiety in favour of the bankrupt Mortimore. The bank- * 656 rupt, it appears, made the purchase partly with a view to building houses upon the estate for their country residences ; but the estate at the time of the purchase was in the occupation of Whitfield, under an agreement for a lease for the term of twenty-one years from the 29th of September, 1844. In the month of June, 1855, however, the bankrupts came to an agreement with Whitfield, by which the bankrupts agreed to lay out some money in repairs and new farm buildings upon the estate ; and Whitfield agreed, when required to do so, to surrender to the bankrupts some parts of the estate, receiving certain compensation fixed by the agreement by way of diminution of his rent. It is not, perhaps, altogether unimportant to observe that the bankrupts became parties to this agreement by the description of Thomas Laurence and William Mortimore of St. Mary-Axe, leather factors, and that the agreement was throughout joint on their part. Soon after the making of this agreement, and in the month of August, 1855. each of the bankrupts, under the agreement with Whitfield, took possession of part of the estate, and built a house and laid out grounds around it ; and they continued to occupy the houses and grounds thus built and laid out by them down to the time of their bankruptcy. The bankrupt Laurence appears also to have got into possession of some further parts of the estate under some further arrangements with Whitfield, and the bankrupts caused parts of the estate to be advertised to be let for building. Immediately on the purchase being made, an account was opened in the books of the firm called the Trotsworth estate account, in which the estate was debited with the mortgage-moneys, and purchase-moneys and all the other payments made by the firm on account of the estate, includ-

ing the rents paid to Whitfield in respect of the lands of
* 657 which *the bankrupts took possession under the arrangements with him, and was credited with all the sums received from Whitfield for the rent payable by him, and all other receipts on account of the estate. The account was annually balanced and interest charged against the estate. The sums charged against the estate in this account, in respect of the rents paid to Whitfield for the parts of the estate which the bankrupts occupied, do not appear to have been charged against the bankrupts in their separate accounts with the firm; but the sums which were expended by the bankrupts in building their houses were charged against them in their separate accounts.

It appears by the evidence that there was an understanding between the bankrupts that ultimately each of them should take the house which he had built and the grounds occupied with it; but there does not appear to have been any final arrangement between them even upon this point. The bankrupts, it appears, calculated that they should be able to let parts of the estate upon building leases, and to realize by the creation and sale of ground rents sufficient to repay the moneys advanced by the firm, and that their houses and the grounds occupied with them would then be left to be divided between them, and would form the profit upon the purchase. In the year 1856 the bankrupts purchased another estate called the Saracen's Head estate, and this estate was also conveyed to them in moieties to uses in bar of dower. As to this estate there was a declaration in the conveyance as to each moiety that the widow of the bankrupt should not be entitled to dower, but that the estate having been purchased by the bankrupts for trade purposes should, as between their real and personal representatives, and in the construction of their wills, be deemed and taken to be personal estate.

* 658 * In the month of April, 1859, the bankrupts deposited the title-deeds both of the Saracen's Head and of the Trotsworth estates with the Bank of England, for securing the payment of bills to be discounted. The memorandum of agreement which was entered into on the occasion of that deposit was expressed to be made between the bankrupts, described as of St. Mary-Axe in city of London, carrying on business in partnership as leather factors, of the one part, and the Bank of England of the other part, and by this instrument the bankrupts covenanted severally to

convey the estates, and in the mean time to stand seised in trust for the bank.

I have entered thus fully into the facts of this case, because questions of this nature depend, as I apprehend, generally if not universally, upon the circumstances. It cannot I think be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade, as the Saracen's Head estate appears in this case to have been, or they may have been bought, not for the purpose of being used or employed in the trade, but for the purpose of a mere speculation on account of the partnership; for I know nothing which can prevent partners from speculating in land, if they think proper to do so, as freely as they may speculate in mere articles of commerce, though foreign to their trade.¹ Again, they may have been bought without reference to the purposes of the trade or the benefit of the partnership, with the intention of withdrawing from the trade the amount employed in the

* purchase, and converting that amount into separate prop- * 659 erty of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase.² The form of the conveyance in these cases does not settle the question, for in whatever form the conveyance may be, there may be a trust of the land which may follow the money, liable, however, as other trusts of the like nature are, to be rebutted by evidence.³ Where land purchased is not merely paid for out of the partnership assets,

¹ See *Dudley v. Littlefield*, 21 Maine, 418; *Ludlow v. Cooper*, 4 Ohio St. 1; *Pitts v. Waugh*, 4 Mass. 424; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *In re Warren, Davies*, 320; *Blake v. Nutter*, 19 Maine, 16; *Gray v. Palmer*, 9 Cal. 616; *Bunell v. Taintor*, 4 Conn. 568; *Coster v. Clarke*, 3 Edw. Ch. 238; *Patterson v. Grace*, 10 Ala. 444; *Black v. Black*, 15 Geo. 445; *Collyer Partn.* (5th Am. ed.) § 3.

² See the remarks of SHAW, C. J., in *Dyer v. Clark*, 5 Met. 579, and of STORY, J., in *Hoxie v. Carr*, 1 Sumner, 180, 181.

³ See *Hoxie v. Carr*, 1 Sumner, 182, 183; *Jarvis v. Brooks*, 27 N. H. 37, 67; *Dyer v. Clark*, 5 Met. 562; *Howard v. Priest*, 5 Met. 582; *Pugh v. Currie*, 5 Ala. 446; *Coster v. Murray*, 3 Edw. Ch. 428; *McGuire v. Ramsey*, 4 Eng. 418; *Collyer Partn.* (5th Am. ed.) § 135.

but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, and accordingly in those cases we find the decisions almost if not entirely, uniform, that the purchased land forms part of the joint estate of the partnership,¹ but where the land is not purchased for those purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchases show that it was made on account of the partnership individually, or of any one or more of them in whose name the land may have been bought.² These, as it seems to me, are the considerations which must guide our determination in the cases before us.

That the estate here in question was not purchased for the purpose of being used and employed in the partnership trade is abundantly clear, and that view of the case therefore may be laid out of consideration. That the whole of the estate was not purchased with a view of withdrawing the amount of the purchase-money from the trade, by way of investment on account of the partners individually, and in their separate capacities, or on account of * 660 either of the partners by way of loan * from the partnership, seems to me upon the evidence in this case to be equally clear. It is negatived by the whole course of dealing with the estate, and by the mode in which the accounts of the estate with the partnership were kept.

¹ See *Dyer v. Clark*, 5 Met. 582; *Howard v. Priest*, 5 Met. 582; *Burnside v. Merrick*, 4 Met. 527; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Peck v. Fisher*, 7 Cush. 386; *Savage v. Carter*, 9 Dana, 410; *Tillinghast v. Champ- lin*, 4 R. I. 173; *Roberts v. McCarty*, 9 Ind. 16; *Eakin v. Shumaker*, 12 Texas, 51; *Pierce v. Trigg*, 10 Leigh, 406; *Davis v. Christian*, 15 Gratt. 11; *Brooke v. Washington*, 8 Gratt. 248; *Forde v. Heron*, 4 Munf. 316; *Hoxie v. Carr*, 1 Sumner, 173; *Lacy v. Waring*, 25 Ala. 626; *Pugh v. Currie*, 5 Ala. 446; *Owens v. Collins*, 23 Ala. 887; *Gaines v. Catron*, 1 Humph. 514; *Hunt v. Benson*, 2 Humph. 459; *Piatt v. Oliver*, 3 McLean, 27; *Hunter v. Martin*, 2 Rich. 541; *Buchan v. Sumner*, 2 Barb. Ch. 167; *Smith v. Tarlton*, 2 Barb. Ch. 336; *Averill v. Loucks*, 6 Barb. (S. C.) 19; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Smith v. Jackson*, 3 Edw. Ch. 28; *Sigourney v. Munn*, 7 Conn. 11; *Goodburn v. Stevens*, 5 Gill, 1; *Jarvis v. Brooks*, 27 N. H. 37; *Collyer Partn.* (5th Am. ed.) § 135, and notes; 3 Kent, 89, in note (b); *Whitman v. Boston & Maine Railroad*, 3 Allen, 133; *Wilcox v. Wilcox*, 13 Allen, 252; *Shearer v. Shearer*, 98 Mass. 107; *Steward v. Blakeway*, L. R. 4 Ch. Ap. 603.

* See *Hoxie v. Carr*, 1 Sumner, 180, 181; *Dyer v. Clark*, 5 Met. 579; *Collyer Partn.* (5th Am. ed.) § 135, in note.

I am of opinion, therefore, that, looking at the case with reference to the whole of the estate, this purchase must be taken to have been made by way of speculation on account of the partnership, and that the petition of the Bank of England accordingly fails and must be dismissed.

There remains, then, only the question on the petition of the assignees as to the houses built by the bankrupts and the grounds and lands occupied with them. I have not considered this part of the case to be altogether free from doubt; but looking to the absence of any definite agreement between these parties, and to the fact of the rent payable by the bankrupts respectively to Whitfield for their several holdings not having been charged to their separate accounts, a fact which does not appear to have been brought before the learned commissioner, and looking more especially to what appears to have been in the contemplation of the parties, that in the ultimate result of this speculation, these houses, grounds, and lands would remain, with other parts of the estate, to be divided as the profits of that speculation, I think that the true result of this part of the case is, that whatever equity there might have been between the bankrupts in the event of partition, had the time of partition arrived, there was no intention to sever these properties from the rest of the estate as separate investments on account of the bankrupts respectively until that time * should * 661 arrive, and that the assignees are therefore entitled to succeed on this part of the case.

I think the Bank of England must pay the costs of their petition, and that there should be no order as to the costs of the petition of the assignees, except of course that they should take their costs out of the estate.

The order was varied by declaring that the whole of the Trotsworth estate and the houses on it were partnership property, and that the value which they had actually realized ought to be deducted from the debt proved by the Bank of England.

In re WARD.

1861. April 27. May 1. Before the Lord Chancellor Lord CAMPBELL.

A bequest of the sum of 2000*l.* long annuities, described as standing in the name of a testatrix who had only 800*l.* of that stock. *Held* to be specific and not demonstrative, and to fail as to the deficiency.

THIS was an appeal from the decision of the Master of the Rolls holding certain bequests to be specific.

The testatrix, Mrs. Ward, by her will, which was dated the 26th November, 1846, bequeathed as follows: "I give and bequeath unto Mary, daughter of the late Sir James Gordon, Bart., the sum of 2000*l.* long annuities standing in my name in the books of the governor and company of the Bank of England. I give and bequeath unto Alexandrina, youngest daughter of the said Sir James Gordon, Bart., the sum of 2000*l.* of the said long annuities standing in my name in the books of the governor and company of the Bank of England." The testatrix, at the date of her will and at the time of her death, was possessed of 800*l.* long annuities only.

The Master of the Rolls held that the legacies were specific. (a) The legatees appealed.

Mr. R. Palmer and *Mr. Bagshawe, Jr.*, for the appellants. — The legacies were demonstrative only, and not specific.

They referred to *The Attorney-General v. Grote*, (b) * 663 * *Creed v. Creed*, (c) *Fonnereau v. Poyntz*, (d) *Hosking v. Nicholls*, (e) *Boys v. Williams*, (g) *Selwood v. Mildmay*, (h) *Lidgren v. Lidgren*, (i) *Pettiward v. Pettiward*, (k) *Orm v. Smith*, (l) *Saville v. Blackett*, (m) *Ford v. Fleming*, (n) *The At-*

(a) See 28 Beav. 519.

(b) 3 Meriv. 316; 2 A. & M. 699.

(c) 11 Cl. & Fin. 491.

(d) 1 Bro. C. C. 472.

(e) 1 Y. & C. C. C. 478.

(g) 2 R. & M. 689.

(h) 3 Ves. 306.

(i) 9 Beav. 358.

(k) Hinch. 152.

(l) 2 Vern. 681.

(m) 1 P. Wms. 778.

(n) 2 P. Wms. 469.

torney-General v. Parkin, (a) Mullins v. Smith, (b) Spurway v. Glynn, (c) Newbold v. Roadnight. (d)

Mr. J. H. Palmer and Mr. Martindale, for the executors.

Mr. Selwyn, for the residuary legatee, referred to Bethune v. Kennedy, (e) Townsend v. Martin, (g) Mills v. Brown. (h)

Mr. R. Palmer, in reply.

Judgment reserved.

May 1.

THE LORD CHANCELLOR. — On the face of the will clearly and unambiguously specific legacies are given of the long annuities standing in the name of the testatrix, and not bequests of money to buy long annuities, or of long annuities generally, which might mean money to buy long annuities. If she had had 4000*l.* long annuities, no doubt could have been suggested, but it is by the argument proposed to turn this into a bequest to each legatee of 2000*l.* * sterling money, a bequest totally different as to * 664 nature and value; and it is said that the bequest is one of 2000*l.* sterling to be charged on her long annuities, that the meaning is the same as if the words “out of” were interpolated, and as if she had bequeathed 2000*l.* sterling to be paid out of her long annuities. In the first place, it may be asked, could this be her meaning, when she had only 300*l.* long annuities? But, in the next place, what right has the Court to interpolate these words? There is no authority to the effect that where there is a clear specific legacy of stock standing in the name of the testatrix, it can be turned into a pecuniary legacy, because the testator has some stock standing in his name, but not enough to satisfy the bequest.

In *Fonnereau v. Poyntz*, the words were, “I give to Mary Poyntz the sum of 300*l.* stock in long annuities,” which might either mean 300*l.* in long annuities or a pecuniary legacy, and Lord THURLOW said, I can let in the evidence of the value of the estate, not to con-

(a) Amb. 566.

(b) 1 Drew. & S. 204.

(c) 9 Ves. 483.

(d) 1 R. & M. 677.

(e) 1 Myl. & Cr. 114.

(g) 7 Hare, 471.

(h) 21 Beav. 1.

trol the bequests which the testatrix has made in words themselves distinct, nor to control a bequest which she has made of a subject which she had accurately described, but because the words which she has used in the description leave it, upon the whole of the context, uncertain whether she intended it as the interest of a gross sum to accumulate, or 300*l.* per annum.

In *The Attorney-General v. Grote*, the legacy was "100*l.* long annuities stock." This was not the proper designation of any stock, and a doubt was therefore left whether it was an annuity of that sum. It was doubtful on face of the will whether the testatrix meant to give 100*l.* per annum or a legacy of 100*l.* Sir WILLIAM

GRANT there said: "I do not say it is not doubtful whether * 665 she may not have meant this, but there is not * enough to show clearly that it is what she did mean;" and he held her to mean an annuity of 100*l.* Lord ELDON in his judgment reversing that decision, said that he considered it doubtful on the face of the will what was the intention of the testatrix. In this case there is no doubt. The case which is the strongest in favour of the appellant's construction is *Boys v. Williams*, where the words were, "I likewise give unto Amelia Boys and Mary Boys 50*l.* each of bank long annuities standing in my name." It must be admitted that there was little ambiguity there. But Lord BROUGHAM proceeded on the ground of ambiguity, for he said: "It was perfectly true that the Court was not at liberty in the case of any written instrument, whether a will of real or personal estate or a deed, to introduce into the question of construction any matter furnished by extrinsic evidence, for the purpose of giving a different meaning to the words from that which their plain import conveyed. Evidence might be admitted to explain, though not to control, the language; to aid, though not to vary or alter the construction." Now in this case it would be to control, vary, and alter the meaning, to say that "2000*l.* long annuities standing in my name" means the sum of 2000*l.* sterling, to be paid out of long annuities standing in my name, or 2000*l.* sterling, to be invested in long annuities.

In *Selwood v. Mildmay*, there was this gift to the testator's wife, "the interest and proceeds of 1250*l.*, part of my stock in the 4*l.* per cents." This clearly meant that 1250*l.* should be paid out of a particular fund; but it was meant to be pecuniary legacy, and, on that fund failing, money payment was ordered to be made. In

Lindgren v. Lindgren, the bequest was thus expressed: "500*l.* of the stock 3*l.* per cent consols now standing in my name in the books of the Bank of *England." But it was followed *666 by other bequests of the said 3*l.* per cent consols. The testatrix had sold out her 3*l.* per cents., but the bequest was clearly intended as a pecuniary legacy payable out of a particular fund. The decree was not for the 100*l.* in money, but for the sum which 100*l.* 3*l.* per cent was worth according to the price on the day of the death of testatrix.

The appeal must be dismissed, but the costs will be paid out of the estate.

* ELWES v. ELWES.

* 667

1861. April 16, 17, 18, 20. May 7. Before the LORDS JUSTICES.

Lands stood limited subject to certain powers vested in the plaintiff and certain charges for the plaintiff's own benefit and for the jointure of the plaintiff's wife, and for portions of his younger children, to the use of the plaintiff for life, with remainder to his sons successively in tail male, with remainder to trustees for 1500 years, in trust, in the event of failure of male issue of the plaintiff, to raise a sum of 100,000*l.* for additional portions for the plaintiff's daughters.

In contemplation of the marriage of a son of the plaintiff's only son, the plaintiff and his son entered into an agreement for resettlement, whereby it was agreed that the plaintiff's son should disentail the reversion and limit the estates after the plaintiff's decease, and subject to his life-interest and powers, and to the exercise thereof, and all "subsisting" charges, to such uses as the plaintiff and his son should appoint, and that the plaintiff and his son should then appoint the lands—in remainder and subject as aforesaid—to the use of the plaintiff's son for life, with remainder to the plaintiff's first and other sons successively in tail male, with remainder to a nephew of the plaintiff and certain other nephews successively for their lives, with remainders to their first and other sons successively in tail, with remainders over. A deed of resettlement was made in pursuance of this agreement, and thereby the lands were appointed, after the plaintiff's death and subject to his life-estate, and to the powers thereto annexed, and of the jointure and any other charges upon the estates to which the plaintiff might be entitled, to the use of the plaintiff's son for life, with remainder to his first and other sons successively in tail male, with remainder to the plaintiff's nephews successively, and remainder over. The plaintiff and his solicitor deposed that neither of them intended by the agreement or settlement to displace the term of 1500 years or the portions of 100,000*l.* thereby secured, except so far as was neces-

sary for the benefit of the plaintiff's son and his issue, but it did not appear that any discussion took place on the subject, or that it was mentioned: *Held*, not a case for reforming the resettlement.

THIS was the appeal of the plaintiff Cary Charles Elwes from the dismissal by Vice-Chancellor STUART of a bill seeking to rectify an indenture of resettlement. The case is reported in the second volume of Mr. Gifford's Reports, (a) where the facts are stated. They were shortly as follows:—

By the plaintiff's marriage settlement, made on the 17th August, 1826, hereditaments in Lincolnshire were limited — subject to certain powers vested in the plaintiff, and to certain charges, including a pecuniary charge vested in the plaintiff, and a jointure rent-charge, and a term for securing 20,000*l.* for younger children — to the use of plaintiff's father, Mr. Robert Cary Elwes, for
 * 668 * life, with remainder to the use of the plaintiff for life, with remainder to the use of trustees for 2000 years to raise portions for younger children, with remainder to the use of the first and other sons of the plaintiff in tail male, with remainder to the use of the plaintiff in tail general, and remainder over.

By an indenture dated the 23d April, 1842, and made between the plaintiff of the first part, his father of the second part, and a trustee of the third part, the hereditaments in question, subject to the uses and estates limited by the deed of 1826 preceding the limitation to the use of the plaintiff in tail male, and subject to the powers annexed to such preceding estates, were limited to the use of the plaintiff in fee, and by a contemporaneous deed the hereditaments were demised to trustees (subject to the aforesaid uses and estates) for ninety-nine years from the death of the plaintiff's father, if the plaintiff should so long live, upon trusts for the benefit of the plaintiff and his wife and children, and subject thereto to such uses as the plaintiff and his father should appoint, and subject to such appointment to the use of the plaintiff's son, Mr. Valentine Elwes, in tail general, with remainder to the use of such other sons as the plaintiff might have successively in tail general, with remainder to the three daughters of the plaintiff successively in tail, with remainders over.

By an indenture of March 16th, 1846, and made between the plaintiff's father of the first part, the plaintiff of the second part,

(a) Page 545.

trustees of the third part, and other trustees of the fourth part, the hereditaments were appointed, subject to the above-mentioned preceding uses and estates, to such uses as the plaintiff and his father should appoint, and subject to such appointment to the use of the first trustees for 1500 years from the death

* of the survivor of the father and son, and the failure or * 669 determination of the limitations to the use of the plaintiff's sons contained in the indenture of August 17th, 1826, and subject thereto to uses which the deed declared. The trusts of the term of 1500 years were to raise 100,000*l.* for the portions of the then and future daughters of the plaintiff in addition to the portions already provided for younger children by the settlement.

The plaintiff's father died in 1852, and the joint power contained in the indenture of 1846, was never exercised.

The only issue of the plaintiff were Mr. Valentine Elwes and the above-mentioned three daughters, all of whom except one had attained the age of twenty-one.

In 1856 a marriage was in contemplation between Mr. Valentine Elwes and Henrietta Catherine Lane, and in contemplation of such marriage certain proposals for the resettlement of the estates in the counties of Lincoln and Northampton were signed by the plaintiff and his son, which, so far as material, were as follows : —

“ Mr. Valentine Elwes to disentail the reversion of the above estates, and limit them in remainder from and after the decease of Mr. Cary Charles Elwes, and subject to his life-interest and powers, and to the exercise thereof, and all subsisting charges, to the joint appointment of the father and son, and subject thereto to the previous uses, under which power Mr. Cary Charles Elwes and Mr. Valentine Elwes are to concur in appointing the whole of the above estates in remainder, and subject as aforesaid to the uses following: namely, to the use of Mr. Valentine Elwes for life, sans waste, remainder, to the first and other sons of Mr. Valentine Elwes successively in tail male, remainder to Dudley, the grandson, and the living younger sons of the late Robert * Cary Elwes, Esquire, successively for life sans waste, and * 670 to trustees during each of their lives in trust to support contingent remainders, and on the decease of each to his first and other sons successively in tail, remainder to Mr. Cary Charles Elwes in fee.”

The proposals then provided for powers to be limited to the plaintiff to charge a sum of 20,000*l.* for his own benefit and for that of his son, with powers of jointuring and of raising portions for the wife and younger children of Mr. Valentine Elwes, and also provided as follows : —

“The details or wording of the above provisions and all matters incidental thereto or necessary for carrying the same into effect are to be left to the discretion of the said Cary Charles Elwes and Valentine Elwes, or their counsel, and the scheme of settlement itself shall also be open or subject to any alterations or additions which the said Cary Charles Elwes and Valentine Elwes shall jointly agree and determine upon in the course of preparing the same, except as respects the provision for Mr. Valentine Elwes, which is not to be altered without his express consent.”

The only contracting parties in the above proposals were the plaintiff and his son.

The bill stated that it was intended by the plaintiff as well as by his son that the proposals should preserve the rights and interests (if any) of the plaintiff's daughters in the settled property, except so far as it was necessary to affect the same by the provisions to be made in favour of the plaintiff and his son and the son's wife and issue, and that the plaintiff as well as his son believed that such rights and interests were so preserved by the proposals. The bill stated that the proposals were prepared by the solicitor of the plaintiff and of his son, and that a brother-in-law of the

* 671 plaintiff and uncle * of his son, who was nominated to be trustee of the intended settlement, conducted, by the joint desire of both the plaintiff and his son, the negotiations between them, and that the above proposals were submitted to the uncle, and that both the solicitor and the uncle were under the impression and belief that the rights and interests of the plaintiff's daughters were so preserved as they were intended to be by the proposals.

The settlement in question was effected by two deeds. One was a disentailing deed, dated the 3d of April, 1856, and made between Valentine Elwes of the first part, the plaintiff of the second part, and trustees of the third part, and thereby the plaintiff, with his father's consent as protector of the settlement of August, 1826, granted to the trustees and their heirs the hereditaments in ques-

tion, to hold to them and their heirs in remainder expectant on the plaintiff's death, and subject and without prejudice to the life-estates limited by the settlement of 1826, and also subject to the powers annexed to such life-estates, and to the jointure thereby secured, and the terms for securing the same, and any other charges upon the estates, or any part thereof to which the plaintiff might be entitled, but freed from the estate in tail male limited to or vested in the plaintiff, and all other estates tail, and all remainders, reversions, estates, rights, interests, or powers expectant or depending thereon, or to take effect after the same, or in defeasance thereof, except, only such powers as were thereinbefore saved and preserved, to such uses as the plaintiff and his son should jointly appoint. The other deed was an indenture of the 5th April, 1856, and made between the same parties, reciting that the plaintiff and his son had agreed to resettle the hereditaments in question to the uses thereafter declared, and thereby the plaintiff and his son appointed that the hereditaments should, after the plaintiff's * death, and subject to his life-estate, * 672 and all other the estates, powers, trusts, and charges referred to in the deed of April 3d, 1856, and thereby expressed to be saved and preserved, remain and be to the use of the plaintiff's son for life, with remainder to his first and other sons successively in tail male, with remainder to the use of the plaintiff's nephew, the above-mentioned Dudley Elwes for life, with remainder to his first and other sons in tail male, and remainders over.

The bill stated that all the parties to these deeds believed that the rights and interests of the plaintiff's daughters in the 100,000*l.* were preserved by the deeds, and that the solicitor did not observe that the same were not thereby so preserved, but that in fact and truth, by reason of the omission of a term of years and proper trusts for the benefit of the plaintiff's daughters, the resettlement was not in pursuance of the intentions of the plaintiff or of his son, or of the agreement come to between them, and did not carry into effect the said intentions or the said agreement.

The prayer was for a declaration that as to so much of the property comprised in the resettlement sought to be rectified as immediately prior to the execution of that resettlement was affected, or would now but for the execution of that deed have been affected, by the term of 1500 years created by the deed of the 16th day of March, 1846, there was, by mistake and contrary to the true intent

and meaning of the plaintiff and his son and the agreement between them, omitted a limitation of a term of 1500-years in remainder immediately expectant upon the failure of the issue male of the plaintiff to trustees upon the trusts declared by the indenture of the 16th of March, 1846, of the term of 1500 years there-
 * 673 by limited, and that the said indenture dated the * 5th day of April, 1856, ought to be rectified accordingly, and for consequential relief.

Sir Hugh Cairns, Mr. G. L. Russell, and Mr. Bushby, for the plaintiff. — The agreement was that the estate was to be settled subject to all existing charges, and the evidence shows that among the existing charges was intended that of the 100,000*l.* It had been the subject of negotiation and arrangement in 1842 and 1846, and could not have been forgotten.

Mr. Malins and Mr. Cracknell, for some of the defendants entitled in remainder.

Mr. Bacon and Mr. Bristowe, for the defendant Valentine Elwes, referred to *Marquis of Townshend v. Stangroom*, (a) *Beaumont v. Bramley*, (b) *Marquis of Breadalbane v. The Marquis of Chandos*, (c) *Rooke v. Lord Kensington*, (d) *Fowler v. Fowler*, (e) and *Jenner v. Jenner*. (g)

Sir Hugh Cairns, in reply.

May 7.

THE LORD JUSTICE KNIGHT BRUCE. — Previously to the year 1856, and at the commencement of that year, the family estates of the plaintiff, or most of them, had become and stood settled on himself for life, with remainder to his only son, the defend-
 * 674 ant, * Mr. Valentine Elwes, in tail male, with remainder to the other son or sons, if any, of the plaintiff, successively in tail male, with remainder to trustees for a term of 1500 years. The trustees of the term were to raise, in the event of a failure of

(a) 6 Ves. 328.

(d) 2 K. & J. 753.

(b) Turn. & R. 41.

(e) 4 De. G. & J. 250.

(c) 2 Myl. & Cr. 711.

(g) 2 Giff. 232; S. C., on app. 2 De G., F. & J. 359.

the male issue of the plaintiff (and therefore of course not before the death of the survivor of the plaintiff and Mr. Valentine Elwes, if at all), a sum of 100,000*l.* by way of additional portions for the benefit of the plaintiff's three daughters, who are all living and of age.

The deed or the last of the deeds by which the estates thus affected were so settled was dated the 16th of March, 1846. By that instrument it was that the reversionary term was created. The estates thus settled were, however, before the year 1856 and at its commencement, subject to certain powers vested in the plaintiff, and to certain charges, including or consisting of a pecuniary charge vested in the plaintiff, a jointure rent-charge in favour of the lady now deceased, who was then his wife, and a term for securing 20,000*l.* as portions for the younger children of that marriage, all which preceded Mr. Valentine Elwes' estate tail.

The father and the son in April, 1856, by deeds dated respectively, the 3d and 5th of that month, materially altered the limitations by which the estates stood affected as I have said in the year 1846, and resettled them. The nature and effect of the resettlement thus made by these deeds was to preserve to the plaintiff his life-interest and powers and all the charges that preceded the estate tail of Valentine Elwes, but to destroy that estate tail and all remainders expectant on it, and the ultimate reversion, and to limit the estates, subject, as I have just mentioned, to the use of the defendant, Valentine Elwes for his life, with certain powers, and so subject to the use of his * first and other * 675 sons successively in tail male, with remainder to the use of the other sons, if any, of the plaintiff successively in tail male, with remainder to the uses of certain collateral relatives of the plaintiff in the male line for life and in tail male, with remainder or reversion to the plaintiff in fee. Those instruments, therefore, or one of them, extinguished and destroyed the term of 1500 years and its trusts, without providing for the three ladies any equivalent or substitution or compensation. They were entitled, however, to portions more certain, though of less amount, namely, the 20,000*l.* already mentioned, which were not, if they could have been taken away.

Of these two deeds the latter, namely, that of 5th April, 1856, with which the plaintiff is dissatisfied, but the defendants, who all claim under it, are satisfied, is in question, and is alone in question,

before us. The plaintiff's dissatisfaction is only with the destruction of the term of 1500 years and its trusts, a destruction effected by the latter of the two instruments. He does not complain of the former of them. The cause was heard originally by the Vice-Chancellor STUART, before whom it came, not only on the pleadings, but also with documentary and other evidence. After full hearing and consideration, his Honor dismissed the bill with costs.

The object of the suit is to have the term of 1500 years and its trusts revived and restored, or to obtain the creation of an equivalent term to be held upon equivalent trusts, so that, in the event of a failure, of the plaintiff's male issue, which of course must involve a failure of Valentine Elwes's male issue, the plaintiff's three daughters may have from the estates the 100,000*l.*, as against

those on whom the deeds of April, 1856, settled the estates
* 676 in the event of the failure of the * plaintiff's male issue;

the plaintiff contending that the deed of 5th April, 1856, was prepared and executed in its present shape through error and mistake, so far as the term of 1500 years and its trusts were concerned, that so far it does not give effect to the intention with which he and his son executed the two deeds of 1856, but contravenes that intention, and that it ought to be reformed accordingly, so as to restore the term of 1500 years and its trusts, or create an equivalent term with equivalent trusts.

When I say, as I do, that to support this allegation, if there is evidence of any worth or account at all, that evidence is in my opinion merely and solely the written agreement, dated the 24th January, 1856, and signed in that month by the plaintiff and his son, which the bill mentions, I do not make the observation in a sense disrespectful towards any party to the cause or any witness in it.

That agreement, which was for a settlement or resettlement of the estates, and of course preceded the deeds of April, 1856, embodies or adopts certain proposals written on the same paper as the agreement, and the words, "and all subsisting charges," and the words, "and subject as aforesaid," which the proposals contain are contended by the plaintiff to show that in January, 1856, the plaintiff and Mr. Valentine Elwes contracted together and meant to settle or resettle the estates so as to preserve the term of 1500 years and its trusts, or to create an equivalent term with equivalent

trusts, and considering the whole of the materials before us, I think that the plaintiff must fail in the suit, unless he can establish that the eight words just quoted ought to be treated as extending to the term of 1500 years and its trusts, — a point not to be determined without attending to the whole contents * of the * 677 proposals, and the state of the title to the property included in the deeds as the title stood immediately before the agreement was signed. Attending, however, to those matters, I am not persuaded that it is necessary or proper to read or construe those two sets of words or either of them as the plaintiff desires. They are, I think, not absurd or unmeaning, nor without object, if construed as the defendants contend, nor do I consider that if so construed they are superfluous. It seems to me a reading consistent with reasonable accuracy (the word “subsisting” especially being remembered, and the positions of the words) to interpret them as the defendants desire to have them interpreted. The plaintiff does not contest the postponement of the 100,000*l.* to the estates and interests of all his male issue, and therefore does not, nor as I think could, contend that upon his theory the proposals, so far as this matter is concerned, are in point of language correctly expressed and accurately arranged. But the draft of the deed of the 5th April, 1856, was settled by a conveyancing counsel of considerable standing, and so settled under the instructions of the family solicitor, in whose office the proposals and agreement were prepared, and who caused the deed to be engrossed. Nor have I been able to bring myself to think that either that solicitor, a respectable gentleman in extensive practice and experience, or that the defendant Valentine Elwes, did when or before the deed of the 5th April, 1856, was executed by him consider or suppose that it did or would restore or keep alive the term of 1500 years or its trusts, or provide any equivalent or substitution or compensation for it or them. I acknowledge that it seems to me impossible, on the materials before us, to pronounce that the deed of 5th April, 1856, expresses defectively or incorrectly the meaning and intention of the father and son in executing it. The plaintiff, therefore, in my opinion, cannot have any relief in this suit. I consider * that the bill should remain dismissed, and that the Vice- * 678 Chancellor’s disposal of the costs should not be disturbed.

THE LORD JUSTICE TURNER. — This is a bill seeking to rectify a

settlement made on the marriage of the defendant Mr. Valentine Elwes, dated 5th April, 1856. The defendant, Valentine Elwes is the only son of the plaintiff, but the plaintiff has three other children who are daughters. Upon the marriage of the plaintiff himself in 1826, the estates comprised in settlement now sought to be rectified were settled to following uses: [His Lordship stated them.]

In 1842 the plaintiff was in difficulties. His estate tail in remainder was then barred, and the estates were resettled, subject to the prior limitations in favour of plaintiff's first and other sons in tail male, to such uses as the plaintiff and his father Robert should appoint, and in default, &c.: [His Lordship stated the limitations.]

In 1846 the plaintiff and his father executed their joint proposals, and limited the estates to the following uses: [His Lordship stated them.]

The title stood thus till the time of Valentine's marriage, when the estate tail, vested in Valentine under the settlement of 1826, was barred, and the estate was resettled to following uses: [His Lordship stated them.]

* 679 * The bill seeks to rectify this settlement by introducing after the limitations in favour of Valentine and his sons the limitation of a term of 1500 years, upon trust to raise 100,000*l.* for the daughters of the plaintiff. The Vice-Chancellor has dismissed the bill, and the plaintiff has appealed.

What plaintiff has to establish in order to maintain his bill is, that there was an agreement between him and his son that, subject to the limitations in favour of the son and his first and other sons, and the other sons of the plaintiff, there should be introduced into the settlement a term of 1500 years to raise 100,000*l.* for the plaintiff's daughters, or at least that the estate should be charged with that sum in favour of the daughters. The plaintiff has mainly relied in proof of such an agreement on the proposals for the settlement which were signed both by the plaintiff and by the defendant Valentine. These proposals are as follows: [His lordship stated them.] It is contended for the plaintiff, that the 100,000*l.* secured by the term of 1500 years having been "a subsisting charge" at the date of the resettlement, and the resettlement having been agreed to be made subject to "all subsisting charges," it ought to have been made subject to the raising of that sum and to the term for securing it. But in my opinion this argu-

ment cannot be maintained. The parties were contracting for a resettlement to be derived out of the estate tail of the defendant Valentine, the son ; and it is difficult to suppose that, in a contract of this nature, they could intend to refer to charges which were behind the estate tail, and would be barred by the estate being disentailed. It is not, as it seems to me, any answer to this argument to say that they, in fact, contracted with reference to the limitations of the estate which were subsequent to the * estate tail of the defendant Valentine, for it may well be * 680 said that they had a common interest in the limitations of the estate, but it would be difficult to say that the defendant Valentine could have any common interest with the plaintiff in the charge in favour of his daughters. So far, indeed, from the contract with reference to the ulterior limitations of the estate furnishing any argument in favour of the plaintiff's case, it seems to me to furnish an argument against it, for the fact of there being a contract as to some of the limitations subsequent to the estate tail is surely strong to show that where contract was intended it was expressed. The language of the proposals, however, seems to me to furnish a stronger argument against the plaintiff's case. The defendant Valentine is to disentail [his Lordship read the second part of the proposals as above set out], and then the resettlement is to be made under the joint power in remainder and "subject as aforesaid." The resettlement, therefore, was to be derived out of the joint power. The estates created under it were to be subject only to the charges to which the joint power was subject, and I do not see how the joint power—the estates created under which were to take effect immediately upon the father's death, and which indeed could not be exercised except during his life—could be subject to charges which could not take effect till after his death. Some such difficulty as this seems, indeed, to have been contemplated by the plaintiff, for the bill asks that the 100,000*l.* charge may be introduced after the limitations in favour of the defendant Valentine and his first and other sons ; but I do not see how this could be done in the absence of express contract.

It seems to me, therefore, that, so far as the proposals are concerned, they furnish no ground for the relief * which * 681 is asked by this bill. But then it was said for the appellant that the letters and the parol evidence give him title to that relief. I think, however, that it plainly appears from the evidence before

us, that the signed proposals constituted the final agreement on which the resettlement was founded, except so far as they were varied by the subsequent agreement; and, this being the case, I apprehend that we cannot look to what had passed before those proposals were signed, and certainly no evidence can be received as to what the parties intended by the language which they used in the proposals. It was said for the appellant, that the surrounding circumstances must be taken into account, and I agree that they must; but when taken into account they fail to show what it was that the parties really intended. Amongst these surrounding circumstances it was much relied upon, on the part of the appellant, that the defendant Valentine was, as it was said, proved to have known of the 100,000*l.* charged; but the fact of his having known — if he did know — of it, furnishes no proof that he agreed to its being kept alive. Again, it was said for the appellant, that the defendant Valentine must be bound by what Mr. Barnard said and did in the course of the negotiation; but what has been already said as to the proposals seems to me to answer this argument; and it is to be observed, too, that the final agreement for the resettlement was signed by the defendant himself.

I have thought it right to make these observations upon the parol evidence and upon the letters, because they were so much discussed in the argument before us, but I think it quite unnecessary to enter more fully into those parts of the case. I do not find that in the whole course of the negotiations for this resettlement one single word was said upon the subject of the * 682 100,000*l.* * charge, or of the term for securing it, and the plain result of the case seems to me to be, that to grant the prayer of this bill would be, not to correct the settlement according to the agreement of the parties, but to add to their agreement a term which had not been determined upon or even agitated between them.

I am of opinion, therefore, that the decree of the Vice-Chancellor in this case is quite correct and that this appeal must be dismissed, and I think with costs.

CLAYTON v. CLARKE.

1861. April 27, 29. May 7. Before the LORDS JUSTICES.

Although the Court will not allow an infant's suit to proceed which is not for the infant's benefit, it ought not, in making a decree for accounts in such a suit, to direct an inquiry whether any benefit has accrued to the infant from the suit, so as to make the answer to that inquiry depend on the result of the accounts.¹

Where an administration suit had been instituted by an infant, in which accounts had been directed and property secured, but the suit appeared not to have been instituted with the view of benefiting the infant, the Court gave the next friend no costs up to the decree.

THIS was an appeal of the plaintiff (an infant) from so much of a decree of Vice-Chancellor STUART as directed an inquiry whether any benefit had accrued to the plaintiff from the suit, and from so much of an order made on further consideration, and on an application to vary the chief clerk's certificate, as refused the application, and as directed the next friend to pay the costs of it and refused him his costs of the suit.

The suit was one for the administration of the estate of Sykes Clayton, the father of the plaintiff.

By the decree made on the 2d of May, 1860, on the original hearing the Vice-Chancellor directed the usual accounts and payment of the debts, funeral, and testamentary expenses, legacies and annuities, and an inquiry as to the testator's real estate and the incumbrances * thereon, and also an inquiry whether * 683 any and what benefit had accrued to the infant plaintiff from the institution of the suit, and further consideration was adjourned.

By the chief clerk's certificate dated the 3d August, 1860, a balance of 263*l.* 11*s.* 5*d.* was certified to be due from the executor and executrix; but the chief clerk certified that the executor and executrix claimed to be allowed payments to the amount of 343*l.* 2*s.* 10*d.* which had not been allowed, as there was no direction in the decree respecting them. And the chief clerk certified that no benefit had accrued to the infant plaintiff from the institution of the suit.

¹ See 1 Dan. Ch. Fr. (4th Am. ed.) 70-72.

A summons was taken out by the plaintiff to vary the certificate and was adjourned into Court and heard with the hearing of the cause on further consideration ; and on the 19th December, 1860, the second of the orders under appeal was made to the effect that the Court did not think fit to make any order on the application of the plaintiff, except that the plaintiff's next friend should pay to the defendants Joseph Clarke and James Lewis and Elizabeth his wife their costs of the application, or to give any costs of the suit to the next friend up to that hearing; and it was ordered that the defendants John Clarke (the executor), and James Lewis (the executrix's husband), and Elizabeth his wife should retain their costs when taxed, as they were thereby directed to be, as between solicitor and client out of the sum of 263*l.* 11*s.* 5*d.*, found by the certificate to be due from them on account of the testator's personal estate.

Mr. Malins and *Mr. Chapman Barber*, in support of the * 684 appeal. — * Such an inquiry as is here directed is unprecedented in an administration decree, and would be in the highest degree inexpedient and dangerous. The Court encourages suits on behalf of infants, unless where malicious motives are shown, or the suit appears to be instituted merely for the sake of costs. But assuming the inquiry to have been rightly directed, the certificate is wrong. For the accounts have been taken, and the balance turns out to be 263*l.*, instead of 7*l.* as stated in the answer. Moreover the plaintiff's person and property have been placed under the protection of the Court, and a balance of 800*l.*, part of the testator's estate which had remained in the hands of the defendants, or some or one of them, uninvested from the 19th August, 1859, as to 600*l.*, part thereof, until the 30th March, 1860, and as to 200*l.*, further part thereof, until the 2d April, 1860, has been invested since and in consequence of the institution of the suit. It cannot therefore be said that the suit has not been beneficial.

They referred to *Richardson v. Miller*, (a) *Stevens v. Stevens*, (b) and *Jeffrey v. Tozer*. (c)

(a) 1 Sim. 133.

(b) 6 Madd. 97.

(c) Rolls, unreported.

Mr. Bacon and Mr. Higgins, for the respondents, referred to *Nalder v. Hawkins. (a)*

Mr. C. Barber, in reply.

May 7.

* THE LORD JUSTICE TURNER. — This is an appeal from * 685 part of the original decree from an order refusing motion to vary certificate, and also from part of the order made on further consideration of the cause.

The bill was filed by an infant by her next friend against the executors and trustees of her father's will for the administration of the father's estate. The executors and trustees are the defendants of Clarke and the father's widow, who has married Mr. Lewis, a solicitor, and he is made a co-defendant by reason of such marriage. The defendants put in their answer, and immediately afterwards gave notice of motion that the bill might be dismissed, or that an inquiry might be directed whether the suit was for the benefit of the infant plaintiff. It is evident from this, that the proceedings in the suit excited angry feeling, not perhaps unnaturally, as the infant plaintiff appears to have been well taken care of by her mother, and not less so by her mother's second husband. Great credit is indeed due to Mr. Lewis for his conduct towards the plaintiff. On the other hand, it must be remembered, that executors and trustees stand in a fiduciary position and are bound to render their accounts in this Court, and that their being called on to do so involves no imputation on their character or conduct. It would have been better, therefore, if the case had not been met with the angry feeling which the proceedings evince.

By arrangement, the motion for dismissal or for a reference was treated as motion for decree, and upon it a decree was made directing the usual accounts to be taken, and directing the inquiry, which is the subject of the first part of the appeal.

* Now that inquiry is certainly an unusual one. No * 686 doubt this Court will not allow a suit improperly instituted on the part of an infant to proceed. The Court has full jurisdiction to stay it. But with all deference to the learned Vice-Chancellor, it is quite new to pronounce a decree for accounts upon an

infant's bill, and at the same time to direct inquiry whether the suit has been for the infant's benefit. Such a decree seems to assume that it is to depend on the result of the account whether the suit was instituted for his benefit or not. But in my judgment the question of benefit ought not to be considered to depend on any such result, nor can I agree that there is no benefit from an infant being a ward of this Court, or that there is no benefit from the property being ascertained and secured. I believe, and experience satisfies me that the general opinion coincides with mine, that where an infant is entitled to property, no better tribunal can be resorted to than this Court for its guardianship and protection. The Vice-Chancellor observed, that he directed this inquiry to justify the next friend, or rather to afford him an opportunity of justifying himself in taking these proceedings. But if those accounts are proper to be taken, as the decree assumes, I cannot see how the justification of the next friend can depend upon their result. I think, therefore, that this inquiry should not have been introduced into the decree, and that the decree should in this respect be reversed.

The inquiry thus falling to ground, the report upon it must of course fall also. It is unnecessary therefore to consider it; but it may be right to say, that, for the reasons which I have already given, I should not have been disposed to agree in it.

The remaining questions arose on the order for further * 687 * consideration. The next friend is ordered to pay the costs of the motion to vary the certificate. In my opinion he should not have been ordered to pay these costs. Independently of the opinion which I have expressed, there was a fair question. But the next friend should have no costs of this motion. He should have come sooner to discharge that part of the decree.

Another question is this: The decree gives the next friend no costs of the suit. Now upon the evidence I cannot separate this suit from some prior litigation which appears to have taken place. But for that I do not believe it would have been instituted. The moving cause for its institution was therefore not the benefit of the infant. I think, therefore, that the next friend should have no costs up to the decree. I think also that he should have no costs of the inquiry as to the suit having been for the infant's benefit. This inquiry should not have been directed; but it was his conduct that led to it. On the other hand, however, the Court

has made a decree, and the infant has had the benefit of the decree in having had the accounts taken and the property ascertained. I do not think the case such as that the infant should have these benefits at the expense of the next friend.

I think, therefore, that the next friend should have costs from the date of the decree except as to the motion to vary the certificate, and as to the inquiry and except as to the appeal as to which there must be no costs.

THE Lord Justice KNIGHT BRUCE concurred.

*THE ECCLESIASTICAL COMMISSIONERS FOR * 688
ENGLAND *v.* THE VESTRY OF THE PARISH
OF ST. JAMES AND ST. JOHN, CLERKENWELL.

1861. Before the Lord Chancellor LORD CAMPBELL.

The exceptions expressed in the 18 & 19 Vict. c. 120, § 90, and 19 & 20 Vict. c. 112, § 3 (the Metropolis Local Management Acts), do not exempt the ecclesiastical commissioners, acting under the Church Building Acts, from the provisions of the first-mentioned Act, and vestries have, under the first-mentioned Act, authority to pull down such portions of churches, as well as of other buildings, as transgress the provisions of that Act.

THIS was an appeal from a decree of Vice-Chancellor STUART granting an injunction, and the question turned on the operation of the Metropolis Local Management Acts on the powers of the ecclesiastical commissioners under the Church Building Act (58 Geo. 3, c. 45).

By the 58 Geo. 3, c. 45, § 33, the commissioners for building new churches were authorized to accept and take any building or buildings fit to be used for or to be converted into additional churches or chapels, and also any lands, tenements, and hereditaments proper for sites of additional churches or chapels, not exceeding in quantity in any one place what might be sufficient access and approach thereto, from any persons willing to give the same; and every such site when conveyed to the commissioners and the church erected thereupon, and when notice thereof was

given to the bishop of the diocese, should become for ever thereafter devoted to ecclesiastical purposes.

By section 62 the commissioners are authorized to build or cause to be built churches or chapels under the provisions of the Act, upon such plans as they should deem most expedient for affording fit and proper accommodation for the largest number of persons at the least expense.

By the 19 & 20 Vict. c. 53, all the powers and authorities * 689 * then vested in the commissioners for building new churches were transferred to the ecclesiastical commissioners.

By the 18 & 19 Vict. c. 120 (the Metropolis Local Management Act), it is enacted (sect. 90) that all the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish mentioned in schedule (A.) to the Act (in which schedule the above-mentioned parish is comprised) or any part of such parish then vested in any commissioners, or in any body other than the vestry of such parish, or in any officer of any commissioners or other body, and all other duties, powers, and authorities in any wise relating to the regulation, government, or concerns of any such parish or of the inhabitants thereof (except such duties, powers, and authorities as relate to the affairs of the church or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto) then vested under any local Act of Parliament in any commissioners or in any body other than the vestry of such parish, or in any such officer, shall cease to be so vested, and shall, save as therein otherwise provided, become vested in and be performed and exercised by the vestry of such parish, and that the provisions of every such Act of Parliament as aforesaid shall be applicable to the vestry of every such parish.

By sect. 143, it is enacted, "that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same was situate, in case the distance of such line of buildings from the highway did not exceed thirty feet, or within thirty * 690 feet of the highway * where the distance of the line of buildings therefrom amounted to or exceeded thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; and in case any building

should be erected contrary to that enactment, it should be lawful for the vestry in whose parish such building was situate to cause the same to be demolished or set back, and to recover the expenses incurred by them from the owner of the premises, in manner therein provided."

By sect. 250, the word "owner" is thus defined: "The word 'owner' shall (except for the purpose of the provisions of this Act requiring notice to be served on owners or reputed owners of land before application to one of her Majesty's principal secretaries of state for his consent to exercise powers of taking land or any right or easement in or over land compulsorily) mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same, if such lands or premises were let at a rack-rent."

By 19 & 20 Vict. c. 112, amending the last-mentioned Act, § 8, it is enacted as follows: "Save as hereinbefore otherwise provided, all the duties, powers, and privileges (including such as relate to the affairs of the church or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor) which might have been performed or exercised by any open or elected or other vestry, or any such meeting as aforesaid, in any parish under any local Act or otherwise at the time of the passing of the said Act of the last session, shall be deemed to have become transferred to and vested in the * vestry constituted by such last-mentioned Act: provided * 691 that all duties and powers relating to the affairs of the church, or the management or relief of the poor, or administration of any money or other property applicable to the relief of the poor which at the time of the passing of the said Act were vested in or might be exercised by any guardians, governors, trustees, or commissioners, or any body other than any open or elected or other vestry, or any such meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees, or commissioners, or other body as aforesaid."

The bill which was filed by the ecclesiastical commissioners and Mr. Courtenay (the incumbent of the district of Pentonville) stated that the above-mentioned parish was insufficiently supplied with

church accommodation, and that in the month of April, 1854, Pentonville was constituted an ecclesiastical district by an order in council; that steps were then taken towards building a new church, and that a site was purchased in Penton Street, from Major Penton, by the plaintiffs, for that purpose. That in July or August, 1860, a plan and description of the proposed site and of the proposed church to be built thereon was submitted to the plaintiffs by the committee and approved of by the plaintiffs, and that the site and the freehold thereof were conveyed to and vested in the plaintiffs, the ecclesiastical commissioners, in accordance with the provisions of the Acts of Parliament. That the plaintiff Mr. Courtenay, who was formerly the minister of St. James Chapel, Pentonville, was appointed the incumbent of the district, and that the freehold of the church and of the site thereof would upon its consecration be vested in him. That he entered into contracts and commenced the erection of the church, and that a considerable number of workmen had been for some months past engaged thereon, and that the church had been raised to a height of about five feet above the level of the ground; but that the defendants, alleging that the church was being erected about ten feet beyond the regular line of buildings in Penton Street, and was an infringement of the 143d section of the Metropolis Local Management Act, threatened forcibly to level to the ground a large portion of the chancel of the church, and had in fact sent a number of workmen upon the site, who had to some extent pulled down and demolished the chancel. The prayer was for an injunction to restrain the defendants from pulling down the portion remaining standing of the intended church and for compensation for the damage already done.

The Vice-Chancellor held that the case was within the exception of the 19 & 20 Vict. c. 112, § 3, and not subject to the powers of the defendants, and made a decree for an injunction.

Mr. Malins, Mr. Woodroffe, and Mr. Lindley, for the plaintiffs, the respondents. — The 143d section of the Metropolis Local Management Act does not apply to a church, for it contains a provision for the recovery of expenses from the owner, and the word "owner" is defined as a person receiving the rack-rent of the land, or who would receive the rack-rent if the land were let at a

rack-rent, a provision not applicable to such a building as a church. But the Act itself excludes the vestry from the exercise of duties, powers, and authorities relating to the affairs of the church, and although this is to some extent altered by the amending Act of the following session, yet the latter Act still more pointedly prohibits the interference of the vestry with the powers vested in any commissioners relating to the affairs of the church. The appeal is therefore without foundation.

* *Mr. Bacon* and *Mr. Hardy*, in support of the appeal. — * 693
The Vice-Chancellor's decision proceeds on the hypothesis of the ecclesiastical commissioners having had, when the Metropolis Local Management Act passed, authority to build in the way in which they have done in this case. That hypothesis is, however, incorrect, for by the Act of the 14 Geo. 3, c. 78, the Act then in force for regulating the buildings of the metropolis, which was in substance, re-enacted, with additional provisions, in the same session as that in which the Metropolis Local Management Act passed, the portion of the building here in question is one which the commissioners were precluded from erecting. That Act provides (sect. 2), that every church, chapel, meeting-house, and other place of public worship shall be deemed of the first rate or class of building. And then by sect. 49 it provides, that no bow window or other projection shall be built with or added to any building of the first, second, third, or fourth rate or class of building next to any public street, square, court, or way, so as to extend beyond the general line of the fronts of the houses in such public street, square, court, or way. The case is therefore not within the exception contained in the Act of the 19 & 20 Vict. c. 112. Nor is it within the exception contained in the Act of the 18 & 19 Vict. c. 120, for the power to pull down part of a church which violates the provisions of the Metropolitan Buildings Act, is not a duty, power, or privilege relating to the affairs of the church.

With respect to the argument founded on the definition of the word "owner," there is nothing in it sufficient to exclude a church from the meaning of the word "building;" and a church is by the Act 14 Geo. 3, c. 78, expressly included in that term.

They also referred to 58 Geo. 3, c. 45, §§ 33-62; * 59 Geo. 3, c. 134, §§ 5-7; 7 & 8 Vict. c. 56; 7 & 8 Vict. c. 84;

8 & 9 Vict. c. 70, § 25; 19 & 20 Vict. c. 112, § 3. *Tear v. Freebody*, (a) *Carter v. Cropley*, (b) and *Tinkler v. The Board of Works for Wandsworth District*. (c)

THE LORD CHANCELLOR. — It is with great reluctance and great pain that I feel myself compelled to say, I think that the decree appealed against must be reversed. It seems to me, as far as my observation goes, that no harm would have followed to the public or to any individual, if this chancel had been allowed to be erected and remain; but I think that it is erected contrary to law, and the law must prevail. If, as was suggested, the commissioners had power before the passing of the Metropolis Local Management Act to erect a building with such a projection, I should have thought that they still retained it; but I find that it is now clearly shown that they had no such power. Under the 14th section of the Act of Geo. 3, it was forbidden. It is expressly forbidden, and therefore is unlawful. Now, can it be said that the sections relied upon by *Mr. Malins* gave a power to dispense with the law? It is impossible. They could only preserve the power which the commissioners before had; but they had no such power, and it would be monstrous to say that those sections which are referred to were meant to confer a power upon them of dispensing with the general law when they thought it convenient. That being so, it was unlawful; and by the express enactment of the 143d section, if the building be erected beyond the general line of the buildings * 695 of the street in which the same is * situate, without the consent in writing of the Metropolitan Board of Works, it may be dealt with as the subsequent part of that section provides. Therefore, I cannot say that this Court has any power to grant an injunction against that being done which the law permits. I regret it exceedingly, but in the discharge of my duty I am bound to say that I think the Vice-Chancellor took an erroneous view on this subject, and that his decree must be reversed. The bill, I think, must be dismissed, but under the circumstances without costs; and I would still throw out a hope that there may be some amicable arrangement, and that the meritorious and laudable intentions of those who wish this church to be completed may not be disappointed.

(a) 4 C. B. (N. S.) 259.

(c) 2 De G. & J. 261.

(b) 3 Jur. (N. S.) 171.

In the Matter of BRENNARD'S PATENT.

1861. May 27. Before the Lord Chancellor Lord CAMPBELL.

Where a person objecting to the grant of letters-patent for an invention had not seen any notice of the application for the letters-patent till after the sealing of the warrant for sealing them: *Held*, that he was entitled to oppose before the Lord Chancellor, and the matter was referred back to the Attorney-General.

THIS was the petition of Messrs. Cable Brennard and John Brennard, who had presented a petition for letters-patent, and by their present petition they prayed that the letters-patent might be sealed, notwithstanding a notice of objection which had been left at the patent office on behalf of the respondent.

On the 15th October, 1860, the petitioners presented the usual petition for the letters-patent, and lodged it at the office of the commissioners of patents, accompanied with the usual declaration and a provisional specification.

On the 22d October, 1860, the Attorney-General gave a certificate of his allowance, which was filed, and * the pro- * 696
visional protection was duly advertised in the London Gazette.

On the 31st October the petitioners gave notice at the office of the commissioners of their intention of proceeding with their application for the letters-patent; and on the 6th of November the notice was advertised in the London Gazette.

On the 1st April, 1861, the petitioners applied to the Attorney-General to cause his warrant to be made for the sealing of the letters-patent, and on the 9th April, 1861, the Attorney-General accordingly issued his warrant, which was sealed with the seal of the commissioners on the same day.

The respondent William Rumney had since caused a notice in writing to be left at the office of the commissioners, stating that he objected to the sealing of such letters-patent on the ground that the alleged invention was not an invention of any manner of importance for which letters-patent could by law be granted, and also that the same was not new and original.

In opposition to the petition, affidavits were filed on behalf of

the respondent, to the effect that the petitioners were not the true and first inventors, and that on the 18th March last the respondent first became aware of the nature of the application for the patent, and that, as soon as he had ascertained what it really was, he had, without any loss of time, communicated with his solicitor upon the subject, and requested him to take the necessary steps to prevent the letters-patent from being granted. That, prior to the said 18th

March last, he had not seen any notice of the application * 697 for the patent, * and that notice of opposition to the patent was given at the patent-office on the 23d March following.

Mr. Webster supported the petition.

Mr. Ashton opposed it.

The Lord Chancellor was of opinion that *Mr. Rumney* had not been guilty of any laches which would disentitle him to oppose the letters-patent, the affidavits explaining sufficiently why he had not opposed the patent before the Attorney-General. His Lordship remitted the case to be heard by the Attorney-General, and ordered the question as well of the sealing of the patent as of costs to stand over until after the Attorney-General's decision.

FORD v. TENNANT.

1861. June 1. Before the LORDS JUSTICES.

To a bill seeking a declaration that a purchase by a solicitor of an annuity charged on his client's estate was made with the client's money, or that the client was entitled to the benefit of the purchase, and for consequential relief, registered judgment creditors of the client were *held*, on a plea, not to be necessary parties.

THIS was the appeal of the defendant from the decision of the Master of the Rolls overruling a plea for want of parties. The plaintiff was the executor of the late Lord Kensington, and the bill sought a declaration that the estate of his testator was entitled to the benefit of the purchase of an annuity which was

charged upon the testator's estates, and had been purchased by the defendant, on the ground that the defendant had been the solicitor of the testator, and had purchased the annuity with the testator's money and upon his instructions.

* The bill prayed for an account of the sums paid by the * 698 defendant arising from the testator's estates in respect of the annuity, and of the sum (if any) contributed by the defendant, and that the defendant might be ordered to assign the annuity to the plaintiff, the plaintiff thereby offering to pay to the defendant such sum (if any) as should be found due to him.

The plea averred that the testator was at his death indebted to twenty-three persons specified in the plea in the amounts therein mentioned on judgments, the particulars of which were set forth, and that these judgment creditors claimed liens on the estates charged with the annuity and all other the real estates of the testator. The case is reported in the 29th volume of Mr. Beavan's Reports. (a)

Mr. Karslake, with *Mr. Roundell Palmer*, in support of the appeal, referred to *Lumsden v. Fraser*, (b) *Adams v. Paynter*, (c) and *Allen v. Houlden*. (d)

Mr. Selwyn and *Mr. Southgate*, for the plaintiff, were not called on.

THE LORD JUSTICE KNIGHT BRUCE.—I think it manifest that no other person than the defendant has any concern or interest in the question to which the bill referred, rendering it necessary that he should be made a party to the suit.

THE LORD JUSTICE TURNER.—I cannot see what Lord Kensington's judgment-creditors have to do with the annuity, the purchase of * which the bill seeks to have declared to * 699 be for the benefit of the estate. The bill is filed by the representatives of a client against a gentleman who had acted as his solicitor, alleging that the solicitor, who had become the purchaser of the annuity charged upon the client's estate, had purchased it, in part at least, with the client's money, and was a trustee of it

(a) Page 492.

(b) 1 Myl. & Cr. 589.

(c) 1 Coll. 530.

(d) 6 Beav. 148.

for his benefit. That is an equity which the plaintiff may succeed or fail in establishing, but the judgment-creditors of the client can have nothing to do with such a question.

It is true that if the plaintiff should succeed, the client's estates will be relieved to the extent of the annuity, and that will in a certain degree be for the benefit of the judgment-creditors; but that such a possibility renders it necessary that all persons who have any kind of interest in the estate should be made parties, is a proposition to which I cannot agree. I cannot assent to the proposition that a bill cannot be filed to establish a personal equity without bringing before the Court every person who may possibly derive some incidental benefit from the result.

It may be that part of the relief sought cannot be obtained at the hearing by reason of the absence of the judgment-creditors, but that does not affect the question now before the Court. The appeal must be dismissed with costs.

1861. June 5. Before the Lord Chancellor Lord CAMPBELL.

Removal of a coroner under 23 & 24 Vict. c. 116.

THIS was the petition of freeholders and justices of the peace for Staffordshire for the removal of the respondent from the office of coroner, on the ground of misbehaviour.

The 23 & 24 Vict. c. 116, § 6, provides that it shall be lawful for the Lord Chancellor, if he shall think fit, to remove any coroner for inability or misbehaviour in his office. The charge brought against the respondent was, that he was in a state of intoxication when a jury had assembled in pursuance of his summons to hold an inquest, and that after keeping the jury waiting two hours he refused to hold the inquest. There was a conflict of evidence on the subject.

The respondent had however been fined for the alleged intoxication by the magistrates.

Mr. Amphlett and *Mr. C. M. Roupell* supported the petition.

Mr. Daniel and *Mr. M Mahon* opposed it.

Ex parte Parnell (a) was referred to.

The Lord Chancellor thought that the balance of evidence on the question of intoxication was against the respondent, and that if it had not been, and it could * be supposed that * 701 the respondent had the use of his faculties at the time, his conduct was such as to render his removal necessary on the general ground of misbehaviour. His Lordship said he was not influenced by the conviction before the magistrates, but only looked at the evidence now before the Court. His Lordship, after referring to *Re Parnell*, directed a writ *de coronatore exonerando* and a writ *de coronatore eligendo* to issue.

MARCHIONESS OF LONDONDERRY v. BAKER.

1861. June 10, 11. Before the LORDS JUSTICES.

Although a plea of a demurrer for want of equity to one bill may be a good plea to another,¹ yet where the plaintiff's title to relief depends, not on the construction of an instrument, but on facts and circumstances, if the allegations in the two bills are different, such a plea cannot be sustained.

THIS was an appeal from a decision of Vice-Chancellor STUART, disallowing a plea to the effect that the question in the suit had been disposed of by the dismissal of a former bill after a demurrer to it had been allowed.

The former bill was filed on the 3d November, 1860, and the prayer of it was that a lease dated in April, 1856, and the counterpart thereof might be declared void as against the plaintiff, and might be set aside and delivered up to be cancelled, and for an injunction against proceedings to recover rent under it. Among the statements of that bill were the following:—

Par. 24. “A duplicate or copy of this deed of the 18th of January, 1693, and a copy or an abstract of the said indenture of the

(a) 1 J. & W. 451.

¹ See *Ex parte Briggs*, 4 De G., F. & J. 198.

29th of January, 1718, were in the possession of the defendant or his said solicitors Messrs. Stable & Deeds at the time they were applied to to produce the documents relating to the title of the defendant to grant the said lease ; but they did not produce them or any of them, or give any notice thereof.

* 702 * Par. 25. " The plaintiff has also by inquiry, since receiving the said notice, ascertained that it is the fact that the present and former lords of the manors of Boulby and Easington have exercised all rights of ownership over the sea-shore up to the cliff bounding and in front of the said estate of the defendants, by taking wrecks thereon with the consent of the receiver of the droits of the admiralty, and by letting the right of getting ironstone, lumps, ore, nodules, and the jet and the cement stone thereon, by agreements with various persons in succession, and have received rents therefor, and that these have been collected, shipped from the said sea-shore in front of the land of the defendant, and that the defendant has not exercised any rights on the sea-shore except for the purpose of working the said alum works, and that in particular the lords of the said manors of Boulby and Easington, in October, 1854, granted a lease of twenty-one years to Mr. Johnathan Richardson of the ironstone on the cliff of the lands of the said lords adjoining the said lands of the defendant, and also on and over the whole length of the sea-shore, not only opposite their own lands, but opposite the lands and alum works belonging to the defendant, excepting only out of the said lease the alum rocks and any interference with the privileges of the defendant in working the same under the said deed of the 18th January, 1693, and that neither the defendant nor any of his predecessors in estate have since exercised any rights over the sea-shore, except in respect of the said alum works."

On the 19th of November, 1860, the defendant demurred for want of equity, and on December 6th, 1860, Vice-Chancellor Wood allowed the demurrer with costs, but gave leave to amend, and, in default of amendment in fourteen days, the bill to be dismissed with costs. There was no amendment, and the bill was accordingly dismissed.

* 703 * On the 14th March, 1861, the present bill was filed, praying exactly to the same effect as the former, but con-

taining the following statements in lieu of the corresponding statements of the former bill : —

Par. 28. “ At the respective times of the said agreement being entered into and the said lease being executed, the defendant and his agents, the said Mr. Foster and Mr. Stable, respectively, were aware of the existence of the said indenture of the 18th of January, 1718, and that the same showed that the title of the defendant to the sea-shore was limited to the use of it in connection with the said alum works only, and the defendant and his said agents respectively were fully aware of the ownership claimed and the acts of ownership exercised over the said sea-shore by the said lords of the said manors, and that the defendant had no right over the said sea-shore, except for the purposes of the said alum works ; but up to the time of receiving the said notice and until the plaintiff had made inquiries and obtained such information, then as aforesaid neither the plaintiff nor any of her agents had any notice, either actual or constructive, that the defendant was not entitled to grant to the plaintiff a right over the said sea-shore to construct a harbour or jetty there for the purpose of working the said ironstone as aforesaid, and the plaintiff and her said agents respectively believed that the said defendant had agreed to grant such right and was entitled to make such grant of the sea-shore accordingly, and the fact of such last-mentioned belief on the part of the plaintiff and her agents respectively was well known to the defendant and his said agents respectively.”

Par. 34. “ The defendant agreed, as hereinbefore mentioned, to grant a lease to the plaintiff of the ironstone, together with right over the said sea-shore, so as to enable the plaintiff to construct a harbour or jetty * thereon, for the purposes required * 704 by her as aforesaid ; and at the respective times of entering into the said agreement and executing the said lease, the defendant and his said agents respectively well knew, as is the fact, that a lease of the ironstone without such power to construct a harbour or jetty would be without value to the plaintiff ; and at such respective times the said defendant and his agents, the said Mr. Foster and Mr. Stable, respectively, knew of the said agreement, and also knew that, notwithstanding the same, the defendant had no title to the said sea-shore, except for the purpose of working the said alum works as aforesaid, and that he had no title whatever to

grant to the plaintiff a right to construct a harbour or jetty on the said sea-shore for the purposes aforesaid, saving only the rights of the Admiralty or Crown to restrict the construction thereof."

To this second bill the defendant pleaded that on the 3d day of November, 1860, and before the filing of the second bill, the plaintiff filed her former bill, which was set out *verbatim* in the plea. And the plea averred that on the 15th of November, 1860, and before the filing of the second bill, the defendant duly appeared to the former bill. And that on the 19th of November, 1860, and before the filing of the second bill, the defendant duly filed his demurrer to the whole of the former bill; and that by the said demurrer he, for cause of demurrer, showed that the plaintiff had not by her former bill stated any case which entitled her in a Court of Equity to any relief or discovery in respect of the matters therein alleged, or any of them. The plea alleged the allowance of the demurrer and the leave to amend, and that no amendment had been made, and that the time within which the plaintiff was at liberty to amend her said bill had expired long before the filing of the second bill, and that, in pursuance of the order

* 705 * of the 6th of December, 1860, and in default as aforesaid of amendment, and before the filing of the second bill, the former bill stood dismissed without further order, with costs to be taxed by the taxing master, and that the last-mentioned costs and the costs of the said demurrer were duly taxed before the filing of the second bill, and that the Court upon the said demurrer decided upon the merits of the question between the plaintiff and defendant, and that the order of the 6th day of December, 1860, determined the rights of the plaintiff and defendant in respect of the matter which the said bill of the 3d day of November, 1860, was for. And the plea further averred that the second bill was for the same matter as the matter which the said bill of the 3d day of November, 1860, was for, and that the document alleged and set forth in the paragraph numbered 9 of the second bill, and therein called the draft agreement, was the same document as was alleged and set forth in the paragraph numbered 9 of the former bill, and that the document alleged and stated in the paragraph numbered 21 of the second bill was the same document as was alleged and set forth in the paragraph numbered 18 of the former bill.

On the 23d of May the plea was heard before the Vice-Chan-

cellor STUART, who overruled it, on the ground that it was not properly framed. The case is reported in the 3d volume of Mr. Giffard's Reports. (a)

Mr. Roll and Mr. Marten, for the appellant. — The Court upon demurrer clearly decided upon the merits, and determined the rights of the plaintiff and defendant in respect of the matter which the bill was for. The present bill is for the same matter as the * former bill. The documents sought to be set aside * 706 in the two bills are identical, and the dismissal upon the merits of the former bill is a good plea to a new bill for the same matter. The subject of both is the same. The relief sought is the same, and the ground of relief, viz. defect of title and misrepresentation, is the same. A short test is this: Would the Court have allowed the two suits to proceed at the same time? *Cooper v. Lewis*, (b) *Henderson v. Cook*, (c) Mitf. Plead. (d) The case could not have been heard more favourably for plaintiff, if the defendant had gone into evidence, because it is impossible to conceive any thing more favourable to the plaintiff than to admit his case as he states it. The case on evidence must have been restricted to the case made by the bill. If the plaintiff had gone into evidence, the bill must have been dismissed at last, and the defendant might have been deprived of costs if he had gone into evidence instead of demurring. *Hollingsworth v. Shakeshaft*. (e) A dismissal upon the allowance of a general demurrer must be considered equivalent to a dismissal after going into evidence. There are three kinds of dismissals: —

1. For want of prosecution, or at plaintiff's request before setting down, i. e. before the Court is seised of the case. — These, we admit, cannot be pleaded. 2. After setting down at plaintiff's request, or upon plaintiff's default at hearing. — Dismissals of this kind may be pleaded. *Gen. Ord. xxiii. r. 13, and see r. 22, p. 81.* 3. After hearing. — These may be pleaded. Mitford on Pleading, (g) Tothill's Proceedings of the High Court of Chancery. (h)

(a) Page 128.

(b) 2 Phil. 178; see 179, 181.

(c) 4 Dr. 306; see 314.

(d) Pages 248, 255.

(e) 14 Beav. 492, 496.

(g) Pages 278, 279.

(h) Pages 41, 47, 50, 52, 53.

* 707 * They also referred to *Young v. Keighly*, (a) *Prax. Cur. Cancell*, 1725, *Hodson v. Ball*, (b) *Partington v. Reynolds*, (c) *Partridge v. Usborne*, (d) *Bainbrigge v. Baddeley*, (e) *Toulmin v. Copland*, (g) *Tarleton v. Hornbey*, (h) *Behrens v. Sieveking*, (i) *The Attorney-General v. Cradock*, (k) *Rutland v. Brent*, (l) *Cornell v. Warren*. (m)

(a) 16 Ves. 348.

(g) 2 Ph. 711.

(b) 1 Ph. 177.

(h) 1 Y. & C. 333.

(c) 4 Drew. 253.

(i) 2 Myl. & Cr. 602.

(d) 5 Russ. 195.

(k) 8 Sim. 466.

(e) 2 Ph. 705.

(l) Finch, 124. The following case was also referred to : —

WELLINGS v. WELLINGS.

Martis, 28 Feb. L. At the Rolls' Chapel, new number then 270. Reg. lib. B. 1674, fo. 263, B.

The matter upon the plaintiff's bill and the defendant's plea put in thereunto coming this present day to be heard before the Right Honourable the Lord Keeper, &c., in the presence of counsel learned on both sides. The scope of the plaintiff's bill being supplemental to a former bill exhibited against the defendants in 1671, which was to discover an agreement alleged to have been made between Edward Wellings, the new plaintiff's father, and the defendant Samuel, for settling of the lands in question upon the plaintiff's father and his heirs, and the plaintiff by this new bill endeavouring to discover whether the consideration money alleged was really paid by the defendant John or not, and whether the defendant John had notice of the said agreement before his pleaded purchase, and that the plaintiff may be at liberty to examine in case the said matters be denied.

The defendants for the plea thereunto say that the purchase made by John, and the consideration for it, was in issue in the former cause, and witnesses were examined thereto, and in case the plaintiffs omitted to examine to the real payment of the consideration money, or to the nature of the agreement before the purchase, or to any other matters proper to be examined to in the other cause, it was through the plaintiff's own default, and it is against the course and practice of the Court after publication and the hearing of the cause to admit a new examination of witnesses to the same matters.

But the plaintiff's counsel insisted the plaintiff was an infant, and the pleaded purchase was fraudulently contrived between the defendants, being father and son, to defeat the plaintiff, and that the point of notice is the chief matter now in question, and that it was not so much as mentioned in the former bill.

His Lordship thereupon, and upon debate of the matter, and upon hearing what was alleged on either side, for as much as notice was not in issue in the former cause, doth think fit and for order that the said plea as to that payment

(m) Finch, 239.

* *Mr. Malins, Mr. T. Stevens and Mr. Langworthy*, who * 708 appeared for the plaintiff, were not called on.

THE LORD JUSTICE KNIGHT BRUCE. — I assume in favour of the defendant, but without deciding it, that the order made by the Vice-Chancellor Sir W. P. WOOD, upon the demurrer, is equivalent to a dismissal of the bill at the hearing, upon the merits. For the purpose of the argument let it be so. Then arises the * question whether the twenty-eighth and the thirty-fourth * 709 paragraphs of the second bill carry the plaintiff's case in point of allegation of material fact importantly further than the twenty-fourth and the twenty-fifth paragraphs of the earlier bill, and I am of opinion that it is quite consistent with the truth of every allegation contained in the former bill, and the insufficiency of those allegations to support a decree, that, upon establishing the facts and the alleged facts stated in the second bill, there would

be overruled, and that the defendant John shall answer as to the point of notice only, but not to the consideration or payment of the purchase-money, and this to be without costs on either side.

The following is the note of the case in the Registrar's minute-book : —

WELLINGS v. WELLINGS.

LORD KEEPER. *Martis*, 23 February, 1674.

Keck. — A charge in the bill for a supplemental answer, and do charge in our plea that the same thing and question in the former cause.

Whitlock. — Do charge that no settlement made without the agreement in 1658, and the bill is to discover the point of notice.

Mr. Solicitor. — The notice to John is the equity of our bill.

Sir John Churchill. — Have pleaded that their purchase and the payment of the money in issue and examined to in the other cause.

Keck. — There was as much occasion to draw the matter of notice in question in the former suit as now, and the payment of the money is now at peace.

LORD KEEPER. — Notice was not in question in the former cause, and there seems to be a collusion, and therefore must answer as to the notice of their agreement only and no further, without costs.

Usually the entry is struck through when the order is drawn up, and the entry is not here struck through. See the order, however, in the registrar's book.

be a title to relief. The words "fraud" and "concealment" are, I agree, not used in the second bill, nor is it necessary to use harsh terms; but there is in the second bill language equivalent to a charge of fraud and concealment against the lessor (the defendant) and against his agents, at which result we cannot arrive merely from the "gentle" (if I may use the expression) and "alternative" (if again I may also use that expression) statements alone contained upon the subject in the former bill. I am of opinion, therefore, that this plea was correctly overruled, and the plea itself is manifestly without foundation.

THE LORD JUSTICE TURNER. — I may, perhaps, be excused for having thought yesterday that the plea of a demurrer allowed to a bill for want of equity, whether accompanied or not accompanied by an order to dismiss the bill, was not a good plea, for no instance has been cited at the bar of any such plea having been ever allowed. Lord REDESDALE does not state (notwithstanding what he says upon the subject) any authority for that passage in his work, on which so much reliance has been placed. It is very much his habit, when there are cases decided on the point of which he is treating, to refer to those cases; but, in this instance, I do

* 710 not observe that he refers to * any. After reading, however, the very high authority of Lord REDESDALE upon this point of pleading, I certainly do not mean to go to the length of saying that in no case could a plea of demurrer allowed for want of equity to one bill be held a good plea to another. There may, perhaps, be cases in which such a plea might be held to be a good plea; but in all cases of pleading, as in all other cases, the circumstances under which the point arises must be considered.

As an instance of the case, perhaps, in which the plea of a demurrer allowed for want of equity to a bill might be a good plea to another bill, we may take this: Suppose a man files a bill, resting entirely upon the construction of a will, and alleges a title under that will, his title being wholly unaffected by any collateral circumstances whatever, and the Court, upon a demurrer being filed to that bill, allows the demurrer, affirming therefore that the plaintiff had no title under the will; then suppose the plaintiff files another bill in another branch of the Court, or in the same branch of the Court, resting precisely on the same title, and the defendant pleads as in this case, it may be that in a case of that description

the plea of the demurrer allowed to the first bill might be a good plea to the second.

But we must consider how different is the case if the title of the plaintiff, instead of depending upon the construction of a particular instrument upon which the Court must necessarily have pronounced its opinion at the time of the hearing of the demurrer on the first bill,—if, I say, the title of the plaintiff does not depend upon that question of construction, but does depend on other facts and circumstances. For if there be a question depending on the facts and circumstances of title, independently of the construction of any particular * instrument, the title of the * 711 plaintiff will vary according to the facts and circumstances which are alleged and contained in the bill. I think that this view derives considerable force from the nature of a demurrer, and the allegations of a demurrer, to a bill for want of equity.

What, then, are the allegations of this demurrer? The demurrer is very accurately drawn, and fully confirms my recollection as to the forms of a demurrer for want of equity: “By the said demurrer I demur to the bill, and for cause of demurrer show that the plaintiff has not by her last-mentioned bill stated any case which entitles her in a Court of Equity to any relief or discovery in respect of the matters therein alleged, or any of them.” The allegation, therefore, is, that the plaintiff has not by her bill stated any case entitling her in a Court of Equity to any relief; that is to say, that the case made on the bill is not such a case as entitled the plaintiff to relief.

The plaintiff files another bill, stating new facts and new circumstances and another case, and the whole issue which arises on the one bill and on the other is, whether the facts and circumstances which are stated in the new bill do or do not amount to a statement of a case which entitles the plaintiff to relief in equity. That therefore is the point which the Court has to decide. It does not decide, when it decides upon the demurrer, that the plaintiff has under no state of circumstances any right to relief; but it decides on the demurrer simply the question whether, upon the facts stated in the bill demurred to, there is or is not title shown to the relief prayed. If the facts and circumstances contained in one bill be different from the facts and circumstances contained in the other, the decision on the one bill can be no guide to the decision on the other.

* 712 * Now that brings my attention to the precise terms in which Lord REDESDALE expresses himself in that part of his work which has been cited in the present argument. He says (p. 225), "A demurrer, being frequently on matters of form, is not in general a bar to a new bill; but if the Court upon a demurrer has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit;" that is, where the Court has decided upon the merits of the question between the parties. Therefore, what is the question between the parties? Why, the question between the parties in the one case is, whether the one particular bill states a case for relief in a Court of Equity. The question is different when you come to a second bill stating a different case; it is therefore not a decision upon the same question. It is different from the case to which I have alluded, where the plaintiff might file his bill on the construction of a will, when the title must depend upon the same question, and can be governed by no other circumstances. There, the question depends upon the allegations in the second bill.

I agree with my learned brother that it is impossible not to see that there are allegations in the second bill which are different from those contained in the original bill, to which the demurrer was allowed. I think that this is a mere experiment to try to alter the practice of the Court on the subject, and that therefore this appeal must be dismissed, and with costs.

* 713

* KNOWLES v. GREENHILL.

HEATH v. GREENHILL.

1861. June 12. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Certificate of counsel for rehearing allowed to be signed by one counsel only.¹

THIS was an application on the part of an appellant that a petition for rehearing might be received on a certificate signed by one counsel only, the case having been argued by one counsel in the

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1479.

Court below, and the subject-matter in contest being only 200*l.* consols.

Mr. Woodroffe, in support of the application, said that the consolidated orders were silent as to the signature by counsel, but that the practice had always been to require two counsel to certify, and this was referred to in the order of the 3d of March, 1697.

Their Lordships ordered the petition to be received.

In the Matter of THE CARDIFF AND CAERPHILLY IRON COMPANY, LIMITED.

GLEDHILL'S CASE.

1861. June 29. Before the LORDS JUSTICES.

Where an applicant for shares in a company, who had paid a deposit, and agreed to accept shares when allotted, wrote to the company before allotment, revoking his application: *Held*, that he ought not to be on the list of contributories.

THIS was an appeal by the official liquidator of the above company from the decision of Mr. Commissioner FONBLANQUE on the 18th May last, removing the name of the respondent, James Tidswell Gledhill, from the list of contributories.

The company was established in September, 1859, for * the * 714 purpose of erecting works and machinery for the manufacture and sale of pig-iron and fire-bricks, and for winning and selling fire-clay, coal, iron ore, and other mineral products from mines and lands situate in the parishes of Llandrissant and Eghoysselan in Glamorganshire.

On the 18th of June, 1860, the respondent signed and sent to the secretary of the company the following letter:—

“ June 18th, 1860.

“ Sir,— Enclosed is 50*l.*, with an application for shares in your company. Your interest in procuring the same will oblige,

“ Sir, your obedient servant,

“ (Signed)

JAS. T. GLEDHILL.”

“ J. W. Towers, *Secretary, &c.*”

The application for shares referred to in the letter was as follows: —

“ Application for shares.

“ To the directors of the Cardiff and Caerphilly Iron Company, Limited.

“ Gentlemen, — Having paid 50*l.* to your bankers, I request you will allot to me fifty shares in the Cardiff and Caerphilly Iron Company, Limited, or any less number, which I hereby accept, subject to the regulations of the company contained in the registered memorandum and articles of association; and I hereby further request you to enter my name in the register of shareholders of the company for such number of shares as may be allotted to me.

“ JAMES TIDSWELL GLEDHILL.”

The respondent enclosed in his letter a check upon the London and Westminster Bank for 50*l.*

* 715 * On the 22d of June, 1860, the secretary wrote and sent to the said James Tidswell Gledhill a letter of that date, which was as follows: —

“ Cardiff and Caerphilly Iron Company, Limited,
“ Cannon House, Queen Street, London, E.C.
“ Secretary’s Office.

“ 22d June, 1860.

“ Sir, — I beg to acknowledge the receipt of your check for 50*l.* and application for fifty shares in this company, the bankers’ receipt for which I beg herewith to forward you.

“ I am, Sir, your obedient servant,

“ (Signed) JOHN W. TOWERS, *Secretary.*”

“ J. T. Gledhill, Esq.”

The bankers’ receipt referred to enclosed in the foregoing letter contained the following: —

“ After the allotment this part will be exchanged for share certificates.”

The petition stated that fifty shares in the said company were on the 19th day of September, 1860, duly allotted to the respondent in compliance with his letter of request, that no application was made by him for share certificates in exchange for his letter of allotment, and that his name was entered in the register of shareholders of the company under the name of "Gledhill," as the holder of fifty shares numbered respectively 5193 to 5242; but that previously, on the 21st day of July, 1860, before any allotment was made to him, he wrote and sent to the secretary of the company the following letter:—

"Neptune Hotel, Liverpool,

"July 21st, 1860.

"Sir,—From circumstances which have transpired since I sent in an application for fifty shares in the Cardiff and *Caerphilly Iron Company, Limited, I shall not be enabled * 716 to accept them and pay future calls; I therefore request that you will lay this before the board of directors, and desire them to cancel my application and return me a check for 50*l.*, the amount of deposit already paid, by return. Please to address us at head or afterwards to my residence. "Yours, &c.,

"(Signed) JAS. T. GLEDHILL."

"J. W. Towers, *Secretary.*"

On the 18th of August, 1860, the secretary of the company answered as follows:—

"Sir,—I yesterday laid before my board your several notes. I am directed by my directors to inform you that, as they are acting as trustees for the general body of shareholders, they have not the power to comply with your request.

"Yours obediently,

"(Signed) J. W. TOWERS, *Secretary.*"

On the 18th October the petition to wind up the company was presented, and on the 1st November the order to wind it up was made.

Mr. Selwyn and *Mr. Doria*, in support of the appeal.—The agreement to accept shares when allotted was a complete accept-

ance; *Birch's Case*, (a) *Cookney's Case*, (b) *Whittet's Case*, (c) *Yelland's Case*, (d) *Ayre's Case*, (e) 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14.

* 717 * *Mr. Bacon* and *Mr. Bagley*, for the respondent, referred to *Brunswick Company v. Muggeridge*, (g) *Wolverhampton Company v. Hawksford*, (h) *Irish Peat Company v. Phillips*. (i)

Mr. Doria, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—I am of opinion that there was no acceptance by the directors of Mr. Gledhill's application for an allotment of shares, and as in fact no allotment was made before Mr. Gledhill's letter of the 21st July, 1860, by which he withdraw his application, he was quite in time to withdraw it, and it was perfectly competent for him to do so. He has therefore never been a shareholder in the company and his name has been properly removed from the list. The appeal must therefore be dismissed, and the respondent must have his costs paid by the official liquidator. The commissioner will deal with these costs, and with those of the official liquidator, as he may think proper.

The Lord Justice TURNER concurred.

(a) 2 De G. & J. 10.

(b) 3 De G. & J. 170.

(c) 2 De G. & J. 577.

(d) 5 De G. & S. 395.

(e) 25 Beav. 513.

(g) 4 H. & N. 160.

(h) 7 C. B. (N. S.) 795.

(i) 7 Jur. (N. S.) 413.

[560]

* WALTERS v. MORGAN.

* 718

1861. July 18, 25. August 4. November 2. Before the Lord Chancellor
Lord CAMPBELL.

There being no fiduciary relation between vendor and a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree of specific performance,¹ and so, *a fortiori*, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain.²

Where, therefore, an intended lessor and lessee of minerals were in the above position as to knowledge, and the intended lessee brought to the lessor a lease ready prepared, without previous negotiation as to the details of it, and induced the latter to sign it, saying he might trust to the proposed lessee for making a fair allowance if the minerals turned out more valuable than was supposed: *Held*, that a bill for specific performance filed by the intended lessee, offering to make a fair extra allowance, could not be sustained, and its dismissal was confirmed on appeal.

THIS was an appeal from the dismissal by Vice-Chancellor Wood of a bill for specific performance. The plaintiff William Walters had been a master mariner, but afterwards became a brick-maker at Tenby, and the defendant Thomas Morgan was a retired draper, formerly residing at King's Cross.

The agreement was dated the 9th December, 1857, and made between the plaintiff and defendant; and thereby the defendant agreed to grant to the plaintiff and the plaintiff agreed to take of the defendant, for one whole year from the day of the date of the agreement, the right of digging, searching for, and carrying off from land of the defendant in Pembrokeshire described in the agreement

¹ See *Livingston v. Peru Iron Co.*, 2 Paige, 390; *Harris v. Tyson*, 24 Penn. St. 347; *Butler's App.* 26 Penn. St. 63; *Kintzing v. McElrath*, 5 Barr, 467; *Smith v. Hughes*, L. R. 6 Q. B. 597, 604; *Smith v. Beatty*, 2 Ired. Eq. 456; *Kerr F. & M.* (1st Am. ed.) 97; *Laidlaw v. Organ*, 2 Wheat. 178; *Matthews v. Bliss*, 22 Pick. 48; *Merriweather v. Herran*, 8 B. Mon. 162; 1 Sugden V. & P. (8th Am. ed.) 5; 2 Kent (11th ed.), 490.

² See *Prescott v. Wright*, 4 Gray, 461, and cases in note (1), above.

all and all manner of stone, sand, minerals, and clay in or upon those lands, and the plaintiff agreed to pay to the defendant for such grant the full sum of 3*d.* per ton weight of 2880 lbs. for stone, rock, or sands and minerals carried from the premises, and the full sum of 4*d.* per ton weight of 2880 lbs. for all clays

* 719 worked or so carried off; and it was further *thereby agreed that at the option of the plaintiff Walters the plaintiff might take and the defendant would, at the expiration of twelve months, grant to the plaintiff a lease for a term of twenty-one years renewable, to commence from Christmas, 1858, such lease to contain a covenant on the part of the plaintiff to pay the defendant the said rate per ton royalty and all usual covenants; and further, the defendant agreed to grant sufficient lands on which the plaintiff might erect buildings and offices for the works he might require during the term of his lease, at no increased rental, provided such land should not exceed in quantity one acre; and the plaintiff agreed, that if he should not require the lease, he would, at the expiration of twelve months, leave all holes and diggings which he should make, sound and properly filled up.

In the month of July, 1858, the plaintiff's solicitor forwarded to the defendant's solicitor the draft of a lease in pursuance of the agreement, and requested the defendant's solicitor to alter it in such a way as he might think proper, and return it for revision.

On the 19th July, 1858, the defendant's solicitor wrote to the plaintiff's solicitor a letter, saying that it would be premature to discuss the draft lease before the twelve months had expired. On the 9th December, 1858, the plaintiff's solicitor wrote to the defendant's solicitor a letter containing the following passages:—

“Under an impression, derived as I am instructed from a statement by Mr. Morgan to Mr. Walters, that he was willing to grant this lease without awaiting the expiration of twelve months, the draft of that document was prepared by me, and handed by Mr. Walters to Mr. Morgan in the early part of July last for his approval, and was subsequently submitted by him to you. The

result was, as you will remember, that Mr. Morgan finally * 720 objected to * sign any lease at that time, and, suggesting a doubt whether the agreement was binding upon him, determined at all events to do nothing in the matter until the expiration of twelve months. As that period will expire to-day, I must request

to be at once informed whether Mr. Morgan is ready or whether he declines to execute a lease to Mr. Walters in accordance with the above-mentioned agreement. In the former case I must beg you to return me the draft with any modifications you may consider your client entitled to have made in it, and in the latter my instructions are immediately to take the necessary steps for compelling a specific performance of the agreement by your client."

The bill, after stating to the foregoing effect and setting out some further correspondence, prayed a specific performance of the agreement.

The defendant by his answer stated that the agreement was entered into by him when he had recently purchased the property and was unacquainted with it, and under circumstances amounting to concealment and misrepresentation of the value of the property on the part of the plaintiff, who had lived in the neighbourhood of the property for some time and was well acquainted with it, and moreover that the defendant was induced to sign the agreement by surprise and without any opportunity of considering the stipulation as to granting a lease, the agreement having been brought to him ready for signature without any draft having been submitted to him; and that, upon his objecting to sign it without further consideration, the plaintiff had represented that the amount to be agreed to be given by the agreement for the sand and clay was the same that he had given to Mr. Wilson, a neighbouring landowner, by which the defendant was led to believe that the sum offered was the * fair value; that the plaintiff had * 721 stated that if the land turned out to be more valuable he would give the defendant his "fair share."

Mr. Rolt and *Mr. E. K. Karlake* supported the appeal.

Sir Hugh Cairns and *Mr. E. F. Smith* appeared for the defendant.

The following authorities were referred to: *Marquis of Townshend v. Stangroom*, (a) *Fox v. Mackreth*, (b) *Turner v. Harvey*, (c) *Myers v. Watson*. (d)

Judgment reserved.

(a) 6 Ves. 328.

(b) 2 Bro. C. C. 420.

(c) Jac. 169.

(d) 1 Sim. N. R. 523, 528.

November 2.

THE LORD CHANCELLOR. — This was a bill filed for the specific performance of an agreement for a lease of mineral property; the bill having been dismissed without costs.

After listening to the long and able arguments at the bar on this appeal, I have carefully perused the very voluminous papers connected with it; and I come to the conclusion that one of the grounds of defence set up by the respondent has been substantiated, so that the decree appealed against ought to be affirmed.

It was quite unnecessary to argue that an equity judge has * 722 not an unlimited discretion as to decreeing or refusing * to decree the specific performance of an agreement. He is bound by rules which his predecessors have laid down, founded on justice and expediency.

In the present case, the signing of the agreement was admitted. But six grounds of defence were relied upon: 1. Inequality on the face of the agreement. 2. That the plaintiff had been a bankrupt. 3. Inadequacy of consideration established by the evidence. 4. The conduct of the plaintiff, after the agreement, with respect to the working of the minerals. 5. The alleged fraudulent burning of the plaintiff's diary. 6. That the plaintiff, with superior knowledge of the quality of the minerals, had unfairly surprised the defendant, and induced him to sign the agreement.

1. I cannot say that this agreement shows upon the face of it any inequality which, without evidence, would justify the Court in refusing to enforce it. The royalty of 3*d.* per ton weight of 2880 pounds for sand, and 4*d.* per ton of the same weight for clay, may be quite fair, although this be the "long ton," without being so specified. A lease for twenty-one years, on such a render, may be fair; and there is nothing necessarily unfair in making the lease renewable; or in the covenant to grant an additional acre for the erection of works, without an increased rental. Considering that by the agreement "all usual covenants" were to be inserted in the lease, I cannot say that the omission in the agreement of a specific covenant for a sleeping rent is fatal. The amount of the sleeping rent could not well be fixed by the Court; but the usual covenant to work the mine, and to get the sand and clay in a proper manner during the lease, might be sufficient.

* 723 2. The defence that the plaintiff had formerly been a * bank-

rupt is wholly untenable, there being no evidence that he is not now solvent and able to perform his engagements.

3. I think that, according to the evidence, the royalty reserved was considerably lower than it might reasonably have been, according to the real value of the sand and clay, but that there is no such inadequacy of consideration established as *per se* would be a sufficient reason for refusing specific performance.¹

4. There appears to me to be nothing in the conduct of the plaintiff after the signing of the agreement, which materially affected the rights of the defendant, or could deprive the plaintiff of the benefit of the agreement, had it been duly entered into.

5. The burning of the plaintiff's diary by his housemaid, which in one part of his judgment the Vice-Chancellor (according to the shorthand writer) said "is what I rest my judgment upon," is certainly suspicious; but I cannot say, that, as explained, it would be enough of itself to support the decree.

6. The ground on which I am of opinion that the decree ought to be supported is, that by the contrivance of the plaintiff the defendant was surprised and was induced to sign the agreement in ignorance of the value of his property. I most fully concur in the doctrine of concealment and misrepresentation as laid down by Lord THURLOW in *Fox v. Macreth*, and qualified by Lord ELDON in *Turner v. Harvey*. There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, *however it may be viewed by moralists. But a * 724 single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement.

So, *a fortiori*, would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time

¹ See 1 Sugden V. & P. (8th Am. ed.) 273, and cases in note (k).

to deliberate and take advice respecting the conditions of the bargain.

In the present case, although the parties had met on several occasions before the signing of the agreement, and had conversed about the digging in the land for a year by way of experiment, yet till the written agreement for the lease was brought by the plaintiff to the defendant "cut and dry," there does not appear to have been any negotiation between them for a lease, nor any proposal respecting the term to be granted (which is substantially forty-two years), or the royalty to be reserved, or any of the covenants to be contained in the lease. Then the plaintiff urges the defendant to sign the agreement, saying "you will trust to me for making a fair allowance if it should turn out more valuable." This is of a piece with his afterwards employing his own solicitor to prepare the lease, and trying to get it signed by the defendant without the defendant's solicitor having seen it. A purchaser who so conducts himself cannot be said to have proceeded with the good faith which even jurists require in such a transaction.

* 725 * It has been argued, that although there might have been a parol representation as to giving the defendant a fair share of the value, this may now be considered as part of the actual agreement, and that a specific performance ought to be decreed of the written agreement with the parol agreement superinduced upon it. But I apprehend that this course can only be adopted properly where the party praying for the specific performance has conducted himself with perfect good faith. I think, therefore, that in this case the bill was properly dismissed.

I have been asked by the respondent to vary the decree, inasmuch as it orders the bill to be dismissed without costs; but I concur with the Vice-Chancellor in thinking that the respondent was himself to blame in signing the agreement with full knowledge of its defectiveness, and that he himself has contributed to the litigation.

I am further of opinion that this appeal should be dismissed without costs. The appellant's counsel and the respondent's counsel have respectively contended most strenuously, and with seeming sincerity, that on all the points, except the burning of the diary, the Vice-Chancellor's judgment was in favour of their client.

This judgment, occupying twenty-three brief sheets closely writ-

ten, and showing a most minute and anxious analysis of every particle of the pleadings and the evidence, I have most attentively and respectfully perused, and I am bound to confess that in the nicely balanced consideration of conflicting assertions and probabilities it is very difficult to say what, upon some of these points, was the conclusion at which his Honor finally arrived.

Upon the whole I cannot say that the appellant was *improperly advised to bring this appeal; and I therefore * 726 order the appeal to be dismissed without costs, the deposit to be returned to the appellant.

Ex parte WILLIAM ACKROYD, JOHN FOSTER and EDWARD TOWNEND.

In the Matter of an arrangement by deed between WILLIAM CHEESEBROUGH and SAMUEL LAYCOCK TEE, carrying on business under the style or firm of WILLIAM CHEESEBROUGH & SON, and their creditors; and

In the Matter of an arrangement by deed between WILLIAM CHAPMAN HAIGH and his creditors.

1860. November 14, 26. Before the LORDS JUSTICES.

A trader and a firm of traders having agreed to assist one another by mutual advances, the following dealings took place between them: The trader delivered to the firm several acceptances and a quantity of wool, and procured bills drawn by the firm to be accepted by strangers on the trader's indemnity. He also made payments on account of the firm. The firm on their part advanced to him cash to the amount of 5000*l.* and delivered to him several acceptances, exceeding the amount of the acceptances delivered and procured by the trader as above mentioned. By a contemporaneous memorandum, signed by the trader, he stated that he had consigned the wool in consideration of the advance of 5000*l.*, and that the firm were to be at liberty to sell it if he should not, when called upon, reimburse their "advances." The acceptances were chiefly those of strangers. It appeared, upon the whole of the evidence, that the wool was deposited in pursuance of an agreement that it was to be a security for all the advances made by the firm, and there was nothing in the evidence to show that the cash received by the firm, upon the discount of the acceptances received by them from and on the indemnity of the trader, did not exceed the cash advance of 5000*l.*

On the affairs of the firm and of the trader being wound up, under arrangements analogous to the bankruptcy law: *Held*, that the holders of the bills delivered by the firm to the trader were entitled ratably to the proceeds of the wool, according to the principle of *Ex parte Waring* (19 Ves. 345).¹

THIS was an appeal from an order of Mr. Commissioner WEST made on the petition of James William Scott, one of the registered public officers of the Yorkshire Banking Company, on behalf of the banking company and all other the holders of bills of exchange who were entitled to participate in a sum of 3352*l.* 7*s.* 2*d.* herein-after mentioned.

* 727 * William Chapman Haigh, for six months and upwards next preceding his suspension of payment, carried on business at Bradford as a woolstapler, under the name or style of "W. C. Haigh."

Edward Smith carried on business as a woolstapler in London.

Smith and Haigh had dealings together, and Smith in the usual course of business consigned wools to Haigh for sale.

Smith also had dealings with a firm of William Cheesebrough & Son, who then also carried on business as woolstaplers at Bradford.

On the 7th of November, 1857, Smith, Haigh, and Samuel Laycock Tee, a partner in the firm of William Cheesebrough & Son, being all at that time (owing to the then state of trade) much pressed for money, met at Derby and agreed to assist each other by the negotiation of bills of exchange in the following manner:—

Smith agreed to hand over to Haigh two bills of exchange for sums amounting together to 1500*l.*, accepted by Messrs. Barnes & Sons, and to deliver to Haigh 151 sheets of wool then valued at about 3500*l.*, and it was agreed that Haigh should transfer the bills and wool, and also any other bills or securities which Haigh could procure, to William Cheesebrough & Son, who should on their part get and assist in getting all such bills cashed or discounted and advanced money and bills of exchange to Haigh on the security of the bills and wools to be delivered to them.

In pursuance of this agreement Haigh delivered to

* 728 * William Cheesebrough & Son the two bills amounting together to 1500*l.*, and the wool.

In further pursuance of the agreement William Cheesebrough

¹ See *Powles v. Hargreaves*, 3 De G., M. & G. 430, and cases in note (2).

& Son, by the direction of Haigh, drew bills for sums amounting together to 12,493*l.* upon a firm of Craven & Harrop, with whom Haigh had dealings, and who, at the instance of Haigh and upon his guaranteeing the payment of the bills at maturity, accepted the bills and delivered them to Haigh, who delivered them to William Cheesebrough & Son.

In further pursuance of the agreement, Haigh subsequently delivered to William Cheesebrough & Son two bills drawn by Haigh upon and accepted by one W. T. Hall, for sums amounting to 1000*l.*

In further pursuance of the agreement, a sum of 3000*l.* was on the 3d of December advanced in cash and bills by Haigh, for William Cheesebrough & Son, to one Charles Fauntleroy of London, making together with the amount secured by the previous bills, but exclusively of the wool, 18,973*l.* 10*s.* 6*d.*

In return for these advances, William Cheesebrough & Son made the following advances to Haigh:—

1857.	£	s.	d.
Nov. 10. Cash	2000	0	0
Nov. 13. Cash	2000	0	0
Nov. 14. Cash	1000	0	0
Bills on A. Holt & Co for	673	8	0
A bill on W. Fison & Co. for	1000	0	0
Nov. 17. Cash	300	0	0
Nov. 20. A bill drawn by William Cheesebrough & Son on Samuel Cunliffe Lister & Co. for	2486	19	
Nov. 23. A bill drawn by Edward Smith upon J. Hubbard & Son for	896	12	0
A bill upon P. A. Barnes & Sons for	500	0	0
A bill drawn by William Yewdall & Son on I. and A. Cheesebrough for	1400	0	0
Nov. 24. A bill drawn by Haigh on Sugden and Briggs for	2000	0	0
Nov. 28. A bill drawn by William Cheesebrough & Son on and accepted by George Carter for	987	16	0
Two bills drawn by Smith upon and ac- cepted by William Forder for sums amounting to	1450	0	0

	£	s.	d.
Dec. 3. Bill dated 2d Dec. drawn by Smith upon and accepted by William Cheesebrough & Son for	3000	0	0
Dec. 5. A bill drawn by William Cheesebrough & Son on and accepted by S. C. Lister & Co. for	2000	0	0

These sums, with 4*l.* 8*s.* 4*d.* for interest, amounted to 21,699*l.* 3*s.* 4*d.*, which exceeded the total amount made payable by the bills so delivered as aforesaid by Haigh to William Cheesebrough & Son by 5765*l.* 13*s.* 10*d.*, for securing which amount the original petition alleged that William Cheesebrough & Son held the wool and also one of the two first-mentioned bills, amounting together to 1500*l.*

* 730 On William Cheesebrough & Son agreeing to make * such advances as aforesaid, Haigh signed and gave to them two letters in the following forms : —

“ Bradford, Yorkshire,
“ 9th November, 1857.

“ Gentlemen, — If you will lend to me £ upon security of the acceptance of Messrs. Craven & Harrop, merchants, Bradford, for the sum of 12,493*l.*, I will guarantee the payment at maturity of the said acceptance.

“ I am, Gentlemen, yours truly,
“ W. C. HAIGH.”

“ To Messrs. William Cheesebrough & Son.”

“ Bradford, Yorkshire,
13th November, 1857.

“ Messrs. William Cheesebrough & Son, Bradford.

“ Gentlemen, — In consideration of the sum of 5000*l.* advanced to me, I have consigned to you as security 151 sheets of wool, Nos., &c. annexed, now lying to your order at the Great Northern Railway Station, Bradford. You are at liberty to sell these wools at the best market prices current, should I not, when called to do so, reimburse your advances.

“ Yours truly,
“ W. C. HAIGH.”

The petition and the affidavits in support of it stated that nothing was ever agreed, stated, or expressed by either party to the other as to whether any of the bills or any sums of money thus advanced were to be considered as specifically advanced against the bills procured and given by Haigh to William Cheesebrough & Son or against the wool, but that each of the parties treated the whole exchanges of money, bills, and wool as one general dealing or account, and that each of them * accordingly so * 731 entered all their dealings in one account only in their respective books and accounts with each other, and that all such dealings were in pursuance of the agreement so come to at Derby as aforesaid, and with the intention of avoiding the three parties to such agreement failing in their respective businesses.

All the acceptances of Craven and Harrop were paid in full.

All the proceeds of the last-mentioned bills and of all the other bills were applied by William Cheesebrough & Son to their own use, and no other cash than the above-mentioned three sums of 2000*l.*, 2000*l.*, and 1000*l.*, was ever paid to Haigh on account of the bills which he had obtained for and paid to William Cheesebrough & Son, amounting altogether to 15,973*l.* 10*s.* 6*d.*, in addition to the wool, except a sum of 300*l.* received by Haigh on the 17th of the month of November.

All the other bills which Haigh delivered to William Cheesebrough & Son were wholly paid in full, except three.

In December, 1857, Haigh suspended payment, and his affairs were being wound up under a deed of arrangement dated the 12th of January, 1858, and made between Haigh, of the first part, William Duckitt, Miles Tillotson, and Henry Webster Blackburn, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being severally creditors of William C. Haigh, of the third part.

In December, 1857, the firm of William Cheesebrough & Son also suspended payment, and their affairs were being wound up under the provisions of a deed of inspectorship * dated the * 732 22d of February, 1858, and made between William Cheesebrough and Samuel Laycock Tee, of the first part, William Ackroyd, John Foster, Edward Townend, and William Quilter, of the second part, and the several persons, companies, and corporations who were respectively creditors of the firm of William Cheesebrough & Son, or of the individual partners thereof or of one of them, of the

third part; and Edward Smith in the same month became and was duly adjudicated a bankrupt.

The deed of inspectorship of the firm of William Cheesebrough & Son and the deed of arrangement of William C. Haigh were both made in accordance with the provisions of the Bankrupt Law Consolidation Act, 1849, and provided for the distribution of the assets of the firm of William Cheesebrough & Son and of William C. Haigh in the like manner as in bankruptcy, and the assets of the firm and of Haigh had been partly administered and divided under and in accordance with such arrangement and deed of inspectorship, and the residue of such assets were yet to be divided thereunder respectively.

The 151 bales of wool were soon after the failure of William Cheesebrough & Son sold by the appellants as their inspectors, and realized 3352*l.* 7*s.* 2*d.*

The Yorkshire Banking Company, and those on whose behalf they presented the petition on which the order under appeal was made, were the holders for value of all the bills obtained by Haigh from William Cheesebrough & Son which still remained unpaid.

The wool was consigned and the bills of exchange given * 733 and received before the date of the insolvency and * suspension of payment of William Cheesebrough & Son, William C. Haigh, and Charles Fauntleroy, respectively.

The Yorkshire Banking Company were the holders of the following bills:—

William Cheesebrough & Son on George Carter.

1857. 9th November. 3 months due. 12th	£	s.	d.
February, 1858	987	16	0

Edward Smith on William Cheesebrough & Son.

1857. December 2d. 3 months due. 5th March,			
1858.	3000	0	0

£3987	16	0
-------	----	---

The petition stated to the above effect, and that the petitioners were advised, that, under the circumstances aforesaid and according to the provisions of the aforesaid deeds of arrangement, the proceeds of the wool ought to be distributed and divided among the petitioners and the other bill holders, but that William Ack-

royd, John Foster, Edward Townend, William Quilter, William Cheesebrough, and Samuel Laycock Tee, although requested by the petitioners so to do, declined to divide and distribute the same, and in that respect had not, as the petitioners were advised, conducted the administration of the estate of the firm of William Cheesebrough & Son in conformity with the deed of arrangement under which they were appointed such inspectors as aforesaid.

The prayer was that the sum of 3352*l.* 7*s.* 2*d.*, or such other sum as might have arisen or should arise from the proceeds of the wool, together with interest thereon, might be paid to the petitioners, to the end * that the whole thereof might be applied in * 734 payment of the petitioners' costs, charges, and expenses, and then ratably divided amongst the petitioners and those on whose behalf they petitioned as the holders of the said bills; and that it might be declared that the petitioners and the other bill holders on whose behalf they petitioned were entitled to dividends on such sums as might remain due on the said bills of exchange after such ratable distribution as aforesaid.

By the order under appeal dated the 21st of July, 1860, it was ordered and declared that the above-mentioned sum of 3352*l.* 7*s.* 2*d.* with interest, after the payment of costs as therein mentioned, ought to be apportioned and ratably divided as prayed by the petition, and consequential directions were given accordingly.

Mr. Giffard, and *Mr. Wickens*, in support of the appeal. — The memorandum of deposit must be looked to for the purpose of determining the object of it, and the consideration which it states is the advance of 5000*l.* only. There is no reference to any other dealing in it. The bill holders can only claim through the equities subsisting between Haigh and Cheesebrough & Co., and these do not extend to the bills in question. The transactions were altogether unlike that in *Ex parte Waring*. (a) There bills were accepted upon a security by way of indemnity being given to the acceptors. In the present case the acceptances were those of strangers, and the bills were delivered by way of advance or loan, or in exchange for other acceptances. The wool had nothing to do with them. Even if it was a security for the ultimate balance upon the result of all the dealings, this * would be a * 735 money balance, and there is nothing like a contract for

(a) 19 Ves. 345.

indemnity against acceptances which was the *ratio decidendi* in *Ex parte Waring*. But if every other point was against the appellants and the wool could be, without any contract for that purpose, turned into a security for the bills as well as for the 5000*l.*, still Messrs. Cheesebrough & Co. had a right to apply the security to the 5000*l.*, and their inspectors have the same right. They referred to *Ex parte Johnson*, (a) *Ex parte Hunter*, (b) *Powles v. Hargreaves*. (c)

Mr. Daniel and *Mr. De Gez*, for the bill-holders. — The wools were deposited in pursuance of the agreement entered into at Derby. Moreover, by the terms of the memorandum itself, the security extended to all the advances, including those by bills. The 5000*l.* was paid and satisfied by means of the sums raised by the discount of Messrs. Craven & Harrop's acceptances. This excludes the application of *Ex parte Johnson*. (a)

Mr. Giffard, in reply. — Messrs. Craven & Harrop's bills were given in exchange for others given by Cheesebrough & Son. The money raised by their discount had nothing to do with the 5000*l.*, which still remains due.

Judgment reserved.

November 26.

THE LORD JUSTICE TURNER. — There are two questions in this case. First, whether the wool, of which the proceeds are in dispute, was ever made a security for the bills on which the claim of the petitioners is founded; and, secondly, whether, assuming * 736 * the wool to have been made a security for the bills, the right of the petitioners is excluded by any appropriation or right of appropriation on the part of Cheesebrough & Son. If the first of these questions be answered in the affirmative and the second in the negative, the case falls within *Ex parte Waring*, (d) and the order of the learned commissioner is right.

Upon examining the evidence in the case, I am quite satisfied that the wool was made a security for the bills. The evidence of Haigh and Smith establishes, as I think, beyond all question that

(a) 3 De G., M. & G. 218.

(c) 3 De G., M. & G. 430.

(b) 6 Ves. 94.

(d) 19 Ves. 345.

it was agreed to be so at the meeting at Derby on the 7th November; and that agreement is not, in my opinion, disproved or displaced, either by the evidence of Cheesebrough & Son or by the written memorandum of the 13th November; for although those witnesses depose that the wool was a security for the 5000*l.* cash, I do not find that they venture to go the length of saying that it was not a security for the bills, or at all meet the statement of the other witnesses upon that point, and although the memorandum of the 13th November is expressed to be made in consideration of 5000*l.* advanced, it purports in express terms to secure to Cheesebrough & Son their "advances," which advances according to the agreement of the 7th November were to be made in cash and bills. The memorandum seems to me to be no more than a partial carrying out of that agreement.

I am of opinion also that the right of the petitioners is not excluded by any appropriation or right of appropriation on the part of Cheesebrough & Son, or their trustees. I can see no trace of any actual appropriation, and, assuming the right of appropriation to have continued after the trust-deeds were executed, which I doubt, I think *that it was at all events incumbent * 737 on the respondents to show that there were cash advances to which the proceeds of the wool could be appropriated, and the evidence is far from satisfying my mind that this was the case. I am not satisfied that the 5000*l.* was not advanced out of the proceeds of Craven & Harrop's bills, and still less am I satisfied that the proceeds of those bills, all of which were received by Cheesebrough & Son and have been paid, did not far exceed their cash advances. I think, therefore, that the commissioner's order is right; and that the appeal must be dismissed and with costs.

The Lord Justice KNIGHT BRUCE concurred.

[575]

WALL v. COCKERELL.¹

1860. November 20, 21, and December 7. Before the Lord Chancellor Lord CAMPBELL.

Solicitors of trustees entrusted by them with money for investment, misapplied it and induced by fraud another client of theirs to execute a mortgage to the trustees for the amount, and handed to the trustees the title-deeds of the mortgaged property, which the solicitors held as the mortgagor's solicitors. In 1855, the mortgagees brought an action against the mortgagor on the covenant contained in the mortgage, and he allowed judgment to go by default. In 1856, the solicitors became bankrupts. In 1859, the mortgagor examined the books of the bankrupts, and then, as he alleged, first discovered the circumstances of the case. In that year he instituted a suit to be relieved against the transaction: *Held*, reversing the decision below, that the mortgagor had, by his conduct and delay, acquiesced in the retention of the mortgage money by the solicitors, and was not entitled to relief.²

Semble, that the decision would have been upheld if the mortgagor had at once disputed the validity of the mortgage.

THIS was an appeal of the defendants from a decree of the Master of the Rolls, setting aside certain securities as having been obtained from the plaintiff fraudulently. The contest was between two innocent parties, as to which of them ought to suffer by fraud of a third.

Up to the year 1855, the plaintiff had employed as his solicitors Messrs. Henry & Cheslyn Hall, who were also in the year 1853 the solicitors of the defendants, the trustees under the marriage settlement of John Wallis Grieve and the Hon. Elizabeth Bowles.

* 738 * The bill stated that in February, 1853, Messrs. Hall, without the knowledge or consent of the plaintiff, undertook to invest part of the trust moneys comprised in the settlement which had been received by them in two sums of 4000*l.* and 1000*l.*, on the security of an interest which the plaintiff took under the wills of his father and brother, and of certain policies of insurance

¹ S. C., reversed in the House of Lords, 10 H. L. Cas. 229.

² See *Vigers v. Pike*, 8 Cl. & Fin. (Am. ed.) 650, 651; 1 Sugden V. & P. (8th Am. ed.) 252, note (z); *Attwood v. Small*, 6 Cl. & Fin. (Am. ed.) 233, and notes; *Graham v. Birkenhead, &c., Railway Co.*, 2 Mac. & G. 146, note (2); *Coles v. Sims*, 5 De G., M. & G. 1, note (1); *Life Association of Scotland v. Siddal*, 4 De G. & J. 74; *Kerr F. & M.* (1st Am. ed.) 301, 302.

belonging to the plaintiff. That no part of the sums of 4000*l.* and 1000*l.* was ever paid to or received by the plaintiff, or applied for his use; and that he never authorized the Messrs. Hall, or either of them, to raise the same for him, nor was he aware that they had raised them; but that the whole transaction was a fraud committed on the plaintiff by the Messrs. Hall for the purpose of concealing the misappropriation by themselves of money belonging to the defendants. That as to one of the deeds by which one of these sums was secured, and which was alleged to bear date the 1st March, 1853, the plaintiff was induced by the Messrs. Hall to execute it, without being told what it was, and without reading it over, and did so solely in reliance on the said Messrs. Hall, and without any consideration for it; and that as to the deeds by which the other of the sums was alleged to be secured, and which were alleged to be dated the 1st August, 1853, he had executed these documents also at the request of Mr. Cheslyn Hall, and without reading them, and was informed by Mr. Cheslyn Hall that the effect of his execution of them would be to enable Mr. Cheslyn Hall, as receiver of the rents and income of the testator's real and personal property, to pay the plaintiff out of such rents and profits a larger monthly sum than theretofore. The bill further stated, that from that time till March, 1855, the plaintiff had received from Mr. Cheslyn Hall, as such receiver, an increased monthly sum, on account of the income to which he was entitled. The bill further stated that the plaintiff believed

* that such additional sum was paid to him out of the rents * 739 and income which belonged to him, and that, save as aforesaid, the plaintiff had never received any consideration for his execution of the deeds. That in the year 1855, the plaintiff, who had frequently applied to the Messrs. Hall for an account of their receipts and payments on his account, became dissatisfied with their conduct, and ceased to employ them as his solicitors. That in October, 1855, the plaintiff was served with a notice by or on behalf of the defendants, to the effect that unless the two principal sums of 4000*l.* and 1000*l.* secured by the deeds of the 1st March, and the 1st August, 1853, with interest, were paid at the end of six calendar months from the date of the notice, the defendants should exercise their power of sale. That the plaintiff was afterwards served with a writ in an action brought against him by the defendants for the recovery of the sums of moneys covenanted to

be paid by the deeds. The bill further alleged that being unable to learn any thing respecting the alleged mortgage, or to obtain any information which would enable him to resist the action, he allowed judgment to go by default for the sum of 5210*l.* 15*s.* 7*d.* debt, and 4*l.* costs. That in June, 1856, Messrs Hall became bankrupts; but that it was not until April, 1859, that the plaintiff obtained from their assignees access to the letters and papers relating to his affairs, and that he then for the first time discovered the fact that the Messrs. Hall had acted as solicitors for the defendants, and also discovered the circumstances under which the deeds were delivered over to them. That he also discovered that neither of the sums of 4000*l.* and 1000*l.* was credited to him in the books of Messrs Hall. The plaintiff submitted that under these circumstances the deeds were fraudulently obtained from him by Messrs.

Hall, and that the same ought to be declared void as
 * 740 * against him, and ought to be delivered up to be cancelled, and that the judgment obtained by the defendants ought to be vacated.

The defendants, by their answer, stated that they were informed and believed that, in and throughout the year 1853, Messrs. Hall were the solicitors of and trustees for the plaintiff, and the receivers of the rents and profits of his estates, and were his general agents in money matters, and that he gave to them general authority to raise and receive money for him, and that he executed any deeds or documents at their request, without particular inquiry; that the plaintiff, by himself and his solicitors, had acknowledged the validity of the deeds in question, and in particular that he was for some time endeavouring to raise money in order to pay off the defendants' claim; and that until the beginning of May, 1859, no question had been raised as to his liability to satisfy their claim, or as to the validity of their securities; but that, on the contrary, he and all his legal advisers and agents throughout admitted the validity of the defendants' claim, and induced them by various promises and assurances of payment to abstain from enforcing their rights, which were then uncontested. The defendants further stated that, owing to the imperfection and insufficiency of the accounts rendered by the Messrs. Hall under their bankruptcy, it was impossible to ascertain the real state of the accounts between them and the plaintiff, or whether, in fact, he had been credited with the moneys or not.

The Master of the Rolls held that the plaintiff was entitled to the relief sought by the bill, and made the decree under appeal.

Mr. Roundell Palmer and *Mr. Pearson*, for the plaintiff, argued in support of the decree.

* *Mr. Selwyn* and *Mr. Surrage*, for the defendants, in * 741 support of the appeal.

Mr. Pearson, in reply.

The following authorities were referred to: *Protheroe v. Forman*, (a) *Young v. White*, (b) *Young v. Guy*, (c) *Vandaleur v. Blgrave*, (d) *Murray v. Palmer*, (e) *Wood v. Downes*, (g) *Perry v. Holl*, (h) and *Mare v. Sandford*. (i)

Judgment reserved.

December 7.

THE LORD CHANCELLOR. — After having very deliberately considered this case, I am inclined to think that if when the plaintiff was served with the notice of 11th October, 1855, distinctly describing the mortgages which he had executed and which he now seeks to set aside, and stating that if the mortgage money with interest was not paid within six calendar months, the trustees as mortgagees would proceed under the power given them to sell the mortgaged lands, he had immediately or in a reasonable time denied the validity of the mortgages; and taken steps to be relieved from his liability upon them, he might have been entitled to relief, although even then he would have had difficulties to encounter: considering that he had actually executed the mortgage deeds without being able to show that any particular fraud was then practised upon him; that he left the deeds in the hands of Messrs. Hall, in whom he then placed unbounded confidence; that the trustees had actually paid the 5000*l.* to Messrs. * Hall, to be invested and * 742 to be paid over to the mortgagor; that the mortgage deeds

(a) 2 Swanst. 227.

(b) 7 Beav. 506.

(c) 8 Beav. 147.

(d) 6 Beav. 565, 567.

(e) 2 Sch. & Lef. 486.

(g) 18 Ves. 120, 128.

(h) 6 Jur. N. S. 491.

(i) 1 Giff. 288.

had been regularly handed over to the trustees ; that the trustees acted throughout with the most perfect good faith, and that if they were chargeable with negligence in indiscreetly trusting the Halls, so was the plaintiff.

But, at any rate, I am of opinion that by his subsequent conduct the plaintiff has deprived himself of all claim to relief for which he now prays ; since, with knowledge or the means of knowledge of all the material facts of the transaction, he never questioned the reality of the mortgages till the end of May, 1859, when he filed this bill ; and in the mean time he repeatedly acknowledged the validity of the mortgages ; he obtained forbearance on promises to pay ; and, in an action brought against him on the covenant to pay the mortgage money, he deliberately, on the 5th December, 1855, suffered judgment by default, and the judgment was duly registered, whereby the trustees were induced not to put in force their power of sale, and were prevented from prosecuting the claim which they would otherwise have had against the Messrs. Hall.

The plaintiff's case is, that he was in ignorance of the facts of the case till April, 1859, and that he cannot be prejudiced by any acquiescence, or promise, or act done by him, till the alleged discovery which was then made. But he can hardly be permitted to say that he had forgotten the execution of the deeds ; and on the 11th day of October, 1855, all the particulars were stated to him in writing, which was served with notice that the power of sale would be put in force. From that time till the filing of the bill he acted upon the supposition that the 5000*l.* had been paid to the Halls as his agents, and that the Halls were his debtors for the amount.

* 743 * He must be considered as having made repeated representations to the trustees that by his agents he had received the mortgage money from them. Accordingly, he treated the Halls as his debtors for the amount, and in the most solemn manner admitted his liability to the trustees on the mortgage deeds. The Halls being considered debtors to him for the 5000*l.*, the trustees were discharged, although there was no specific payment of the 5000*l.* by them to him ; and, as was lately held in the case of *Perry v. Holl*, (a) payment in account may operate as payment in moneys numbered. Although it turned out that the balance of accounts between the plaintiff and the Halls was greatly against

(a) 2 Giff. 138.

them, this could not prejudice the trustees, who had been told by the plaintiff that he had received the 5000*l.* from their agents.

It seems to me that the plaintiff seeks to attach a most exaggerated importance to the supposed discovery of April, 1859, when he obtained an inspection of the accounts and papers of the Halls. The trustees assert that these accounts are so irregular and in such a confused condition that no accurate information can be obtained from them of the pecuniary dealings of the Halls. But if it were admitted that these accounts prove in the clearest manner that the Halls never appropriated any part of the 5000*l.* of the trust money in their hands to the use of the plaintiff, and that he never had received any part of it from them ; nevertheless, if at any stage of the proceeding the money was to be considered in the hands of the Halls as the agents of the plaintiff, the mode of payment and his misapplication of it would be immaterial to the trustees.

* But however valuable the information may be, it might * 744
all have been obtained in the year 1856. If other means failed of bringing the Halls to account and obtaining inspection of their accounts and papers, they were made bankrupts in the month of June in that year, and the plaintiff, as a creditor, might have examined them on oath and obtained from them a disclosure of all their dealings with him, and an inspection of all their books and correspondence. The plaintiff, by his successive solicitors or agents, Waters, Mason, Maddocks, and Flower, still acknowledged his liability on the mortgaged deeds and promised payment. Indeed, it was only on the question whether the trustees would agree to forego the payment of interest that the negotiation for payment of the principal went off in April, 1859. As late as 12th April, 1859, Flower, by the authority of the plaintiff, in a letter of that date addressed to Rivington, the solicitor of the trustees, asked for a delay of the sale, and promised payment to them of the mortgage money.

It is not the least curious fact in this case, that the plaintiff, in February, 1856, after full knowledge of the mortgages, and after he had dismissed the Halls from being his solicitors, dismissed Waters from being his solicitors and went back to the Halls, again appearing to place entire confidence in them, and expecting payment from them, as his agents, of the amount of the mortgage money which they had received from the trustees.

I proceed upon the grounds that the plaintiff has confirmed the validity of the mortgages with the knowledge or means of knowl-

On the 14th of December, 1860, the bankrupts filed a petition for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849.

On the 17th of January, 1861, a private sitting was held under the petition, and was on the application of creditors adjourned to the 15th of February.

In the mean time the solicitor of the debtors called a meeting for the 9th of February, 1861, on which day it was accordingly held, and a statement having been laid before the meeting, it was resolved that the meeting should be adjourned for a week. A committee was also nominated to report whether an offer of a composition of 4s. in the pound should be accepted, and the debtors

promised to attend the committee and give all necessary * 748 * explanations. The debtors did not, however, attend, but

on the 11th of February appeared before the commissioner, and stated that they found they were unable to arrange with their creditors under the petition, and were "not desirous of making a *bonâ fide* arrangement with their creditors," whereupon an order was made by the commissioner adjudging the debtors bankrupts, and adjourning all further proceedings into the public Court.

On the 29th of February, creditors' assignees were chosen and appointed. On the 7th of March the bankrupts were examined and a balance-sheet and cash account were filed. The last examination was appointed for the 22d of March, but had been adjourned, and had not taken place, when, on the 1st of May, the appellants presented the petition on which the order under appeal was made. By that petition, and the affidavit in support of it, the appellants stated that the books and accounts of the dealings and transactions of the bankrupts had recently been investigated, and that it had been thereby ascertained (as the fact was) that, two days before the presentation of the petition for protection of the bankrupts, one of them received from the Birmingham Banking Company 490*l.*, and had thereout paid 280*l.* to the father-in-law, and 180*l.* to the brother-in-law of one of the bankrupts, and that, two days after the presentation of the petition for protection, they had paid to the solicitor for the banking company 175*l.* Also that one day after the presentation of the petition they had delivered over to their solicitor a bill of exchange, and that on the 17th or 18th of December, 1860, they handed over a bill of exchange for 950*l.* 8*s.* to a creditor, as a security for his debt. Other

transactions of the same kind were stated. The petition on which the order under appeal was made prayed that the order of the 11th of February, 1861, adjudicating the debtors bankrupts, * and adjourning the petition for protection into the public * 749 Court might be discharged, that the petition for protection might be dismissed, and that the adjudication might be annulled, of that the appellants, or one of them, might be at liberty, notwithstanding the adjudication, to file a petition for adjudication of bankruptcy against the bankrupts, the appellants undertaking to do so, and that in the mean time all proceedings must be stayed under the existing adjudication.

In opposition to the petition, the bankrupts deposed that they had not pledged themselves to attend the creditors, and that, on the 11th of February, they abandoned their intention of making an arrangement for the following reason: That they had up to the preceding August carried on business with a third partner, and that this created legal difficulties in the way of an arrangement and of obtaining the statutory majority of assenting creditors.

With respect to the alleged preferential payments mentioned in the petition, the bankrupts stated that these payments were made in performance of express contracts previously entered into under circumstances of pressure, which they detailed.

The commissioner dismissed the petition on the grounds of delay in presenting it; of doubt as to the success of proceedings to impeach the transactions in question; of the existing adjudication being clearly valid, while a new one might not be so; of the transactions in question being impeachable (if at all) under the existing adjudication; and of doubt as to the jurisdiction of the Court of Bankruptcy to annul an adjudication, at all events if legally valid, without and against the consent of the bankrupts, and without any creditor having had an opportunity of being heard as to the expediency of substituting * a doubtful for a clearly * 750 valid adjudication. With respect to *Ex parte Taylor*, (a) which had been cited before the commissioner, he observed that the order there was ultimately made with the consent of the bankrupt, and that in the present case, at all events, there was too much doubt to render it proper to run the hazard of making the order sought.

Mr. Bacon and *Mr. D. Gez*, in support of the appeal. — They referred to *Ex parte Burnett*, (a) *Anon.*; (b) and as to the possibility of overreaching transactions by relation to an act of bankruptcy where there is no petitioning creditor, they cited *Stevenson v. Newnham*, (c) *Nicholson v. Gooch*, (d) *Monk v. Sharp*. (e)

Mr. C. Swanston, for the assignees, did not oppose the appeal.

Mr. Selwyn and *Mr. Roxburgh*, for the bankrupt Chapman; and *Mr. Townsend* and *Mr. Fisher*, for the bankrupt Granger. — There is no ground for the proposition that fraudulent dealings cannot be set aside unless under a creditors' petition. Although they may not be capable of being impeached under an adjudication otherwise obtained by mere relation to an antecedent Act of Bankruptcy, there is no authority or principle for saying that the assignees, under such an adjudication, cannot impeach a fraudulent preference or any other fraudulent transaction. This appears * 751 from one of the leading authorities cited against us, *Stevenson v. Newnham*. (g) At all events it would be unjust to the bankrupts to annul the adjudication after so long a delay, which is wholly unaccounted for.

Mr. Bacon, in reply.

Judgment reserved.

Their Lordships held, that the appellants ought to be allowed an opportunity of obtaining a new adjudication, and the following order was made: —

“The said assignees by their said counsel consenting thereto, and the said petitioners by their said counsel hereby undertaking to proceed forthwith to endeavour to obtain another adjudication of bankruptcy against the said bankrupts, this Court doth order that the petition for arrangement presented by the said bankrupts

(a) 4 De G. & S. 54.

(d) 5 El. & Bl. 999.

(b) 4 De G., M. & G. 872.

(e) 2 H. & N. 540.

(c) 13 C. B. 285.

(g) 13 C. B. 285; and see *Ex parte Norton*, De G. 504, there cited and commented upon.

to the Court of Bankruptcy for the Birmingham district on the 14th day of December, 1860, be and the same is hereby dismissed, and that the said petitioners be at liberty to apply for such adjudication accordingly, and that all proceedings under the present adjudication be stayed until further order without prejudice to any question; and it is ordered, that the said petition do in all other respects stand over, and the said parties, or either of them, are to be at liberty to apply to this Court touching the measures in question as they may be advised."

* *Ex parte* EUGENE CHANINEL, CLAUDE CHANINEL, * 752
MELAINE CHANINEL, and JULES COQUET.

In the Matter of CHARLES NICHOLSON, EDWARD PASCALL and WILLIAM STONE, Bankrupts.

1861. July 29, 30. Before the LORDS JUSTICES.

Slight circumstances are sufficient to prove a contract between creditors of a dissolved firm and continuing partners, that the debts due from the dissolved shall become debts due from the new firm. Therefore where a new firm, consisting of two of the partners of a dissolved firm of three, sent a circular to the creditors of the three, stating that the debts of the three would be paid by the two, and creditors of the three sent to the two accounts debiting them with debts due from the three: *Held*, that the creditors were entitled to prove not only these, but the other debts of the three against the two.

THIS was an appeal from the decision of Mr. Commissioner HOLROYD, admitting in part only proof of a debt tendered by the appellants against the joint estate of two of the bankrupts, — the commissioner holding the residue of the debt to be provable not against the joint estate of the two, but against that of three.

The following were the circumstances of the case as appearing on the petition of appeal and affidavits in support of it: —

For some time previously and down to the 21st of March, 1861, the three bankrupts carried on business in London as silk merchants, in partnership, under the style or firm of Nicholson, Pascall, & Stone, and the appellants had sold and delivered to them large

quantities of silk goods and shawls of French manufacture. The course of business was for the appellants at the close of every month to make up and transmit to the three bankrupts an account of the goods supplied by the appellants during the month, and to draw bills of exchange upon the bankrupts for the amount. These bills usually bore date on the first day of the second month after that in which the goods were delivered.

* 753 * The bills were not forwarded directly by the appellants to the bankrupts, but were discounted by the appellants with their bankers at Lyons, and were afterwards forwarded to London, and presented for acceptance by the holders or their agents to the bankrupts.

On the 22d of March, 1861, the bankrupt Pascall retired from the partnership with the consent of his copartners, and a deed of dissolution was duly executed by all the bankrupts by which Pascall assigned all his interest in the partnership estate and effects to Nicholson and Stone, and Nicholson and Stone thereby covenanted to pay and satisfy all the partnership debts and liabilities and to indemnify Pascall against the same.

Notice of the dissolution of partnership was duly gazetted, and on the 22d of March a circular was sent by the bankrupts to their customers and creditors, and amongst others to the appellants, which was as follows: —

“ London, March 22, 1861.

“ 39, Canon St. West.

“ Gentlemen, — We beg to inform you that Mr. Pascall retires from our firm this day by mutual consent.

“ The business will in future be carried on by the remaining partners, under the firm of Nicholson & Stone, who will receive and pay all debts due to or owing by the late firm of Nicholson, Pascall, & Stone.

“ Your obedient servants,

“ NICHOLSON, PASCALL, & STONE.”

Before this circular reached the appellants they had drawn
* 754 several bills of exchange upon the three bankrupts * in respect of goods previously delivered to the three bankrupts, the aggregate amount of such bills being 4253*l.* 12*s.* 3*d.*

After the receipt of the circular, the appellants supplied goods to and dealt with the remaining partners as they had previously dealt with the firm of the three.

All the bills drawn by the appellants upon the three which had arrived at maturity before the 22d of March, 1861, were duly honoured, and a bill for 13*l.* 16*s.* 11*d.*, dated the 1st of January, 1861, drawn by the appellants upon the three and accepted by them previously to the 21st of March, 1861, was paid by the firm of the two upon the 4th of April, 1861, which was the day upon which such last-mentioned bill became due, and the appellants heard nothing of any of such bills after depositing them for discount.

The goods thus supplied were entered in the appellants' invoice books as sold to the two, but in the ledger no new account was opened, the goods sold to the two being posted to the debit of the old account, and written on the same leaf, without any other distinction than that afforded by the date of the invoices.

On the 30th March, 1861, the appellants caused an account to be made out and forwarded to the firm of the two, in which the two were debited with all the goods delivered in that month, without making any distinction between the goods supplied in that month before the retirement of E. Pascall from the partnership and those supplied subsequently to such retirement. The first item of this account under date, December, 1860, was one of goods ordered in November, 1860, to be delivered in the months of January, March, and * April, 1861, but which were in * 755 fact delivered in December, 1860.

The account also contained charges for goods ordered in November, 1860, to be delivered in March, 1861, and which were accordingly delivered in that month.

On the 30th April, 1861, a further account was forwarded by the appellants to the firm of the two, containing a statement of all goods delivered during that month, and also a statement under date of December, 1860, of the remaining portion of the goods ordered in November, 1860, to be delivered in January, March, and April, 1861, but in fact delivered in December, 1860; and such last-mentioned account also contained charges for goods ordered in November, 1860, to be delivered in April, 1861, and which were accordingly delivered in that month.

At the date of the bankruptcy there was due to the appellants 918*l.* 11*s.* 9*d.*, of which, 2782*l.* 10*s.* 11*d.* was for goods delivered

to the firm of the three, the remaining 6404*l.* 0*s.* 10*d.* for goods supplied to the firm of the three.

In respect of the debt of 6404*l.* 0*s.* 10*d.* the firm of the three had accepted seven bills of exchange, drawn by the appellants before the retirement of Pascall, and amounting in the whole to 3188*l.* 19*s.* 2*d.*, and the appellants, before they became aware of the dissolution of the partnership, had drawn two other bills upon the three, which last-mentioned bills had not been accepted at the date of the dissolution of partnership, but were afterwards accepted by Messrs. Nicholson and Stone, in the name of the three, but without the authority of Pascall.

* 756 * The commissioner was of opinion that, in respect of what was included in the two accounts sent by the appellants to Messrs. Nicholson and Stone, and the amount of the two bills drawn upon the bankrupt after the dissolution of the partnership and accepted afterwards in the name of the three, but without the consent of Pascall, the appellants were entitled to proof against the estate of the two ; but that as to the rest of their claim, they were only entitled to prove against the estate of the three. The commissioner admitted the proof accordingly.

Mr. Gifford and *Mr. Bagley*, in support of the appeal. — The commissioner's decision proceeded on the ground that the joint liability of the three was not discharged, and that consequently there was not sufficient consideration for the new promise of the two. But the existence of the debt is quite sufficient consideration, and it is not necessary that the outgoing partner should be discharged. The commissioner also thought it doubtful whether the new promise was sufficiently established in evidence. But very slight evidence is sufficient to prove such a contract under circumstances like those of the present case.

They referred to *Winter v. Innes*, (a) *Ex parte Williams*. (b)

Mr. Bacon and *Mr. C. T. Simpson*, for the assignees. — There is no sufficient evidence even of any offer on the part of the two to take upon themselves alone the debt of the three. The circular of the 22d March merely designated the two as the agents

(a) 4 Myl. & Cr. 101.

(b) Buck. 13.

of the three for * the purpose of receiving and paying their * 757 credits and debts, without purporting to assume any liability personally. (a) But even if it amounted to an offer to assume new instead of the old liability, there was no acceptance of it. On the contrary, the appellants went on dealing exactly as they had done previously. At the utmost the acceptance did not extend beyond the items which the commissioner has allowed.

Mr. Clement Swanston, for a creditor of the two, supported the same view, and insisted that as Pascall was not released there was no sufficient consideration for a new promise.

Mr. Bagley, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that there was here a contract for valuable consideration on the part of the two to pay the debts of the three, and that the proof should have been admitted for the whole demand against the joint estate of the two.

THE LORD JUSTICE TURNER. — I am entirely of the same opinion. Very slight circumstances are sufficient to prove a contract on the part of continuing partners to take upon themselves a debt of the former firm.

The following were the terms of the order: —

“This Court doth order that the order of the commissioner, dated the 3d day of July, 1861, be varied, and that the * petitioners be at liberty to go in under the adjudication * 758 of bankruptcy made against the bankrupts, and prove for the sum of 9186*l.* 11*s.* 9*d.* against the estate of the bankrupts, Charles Nicholson and Wm. Stone, and be admitted creditors thereunder for that amount, and be paid a dividend or dividends thereon ratably and in equal proportions with the rest of the creditors of the said bankrupts, Charles Nicholson and Wm. Stone, seeking relief under the said adjudication, and that the commissioner do receive and admit such proof accordingly.”

(a) See *Ex parte Sprague*, 4 De G., M. & G. 866.

WITHAM v. WITHAM.

1861. August 3. Before the LORDS JUSTICES.

A testator gave the income of his residuary estate of his wife for life and the capital equally among his children who should be living at his death, but directed that if any daughter married, the interest of her share should be paid to her for her separate use for her life, and after her death to her husband for his life, and after the death of the survivor equally among their children; and if the daughters had no children living at their respective deaths, the principal of their portions to be at their own disposal: *Held*, that the contingency of a daughter's marrying was not restricted to a marriage in the lifetime of the widow.

THIS was a special case. William Witham by his will gave and bequeathed as follows:—

I give and bequeath to my wife the interest, dividends, and annual produce of all the rest and residue of my personal and of my real estate for and during her life, and after her death I give the same residues unto and equally amongst all my children now living, or who may be alive at my death, for their own use and benefit absolutely; but I direct that if any of my daughters shall marry, the interest of their respective shares shall be paid to them for their respective lives for their separate use, independent of their husbands, and the receipts of my said daughters for the same shall alone be discharges for the same; and after the death of such respective married daughters, such interest and dividends shall be paid to their respective husbands for their respective lives,
 * 759 and after the death of the survivor * of such husband and wife, the principal of the respective shares of any married daughters shall be divided amongst the children of each of my said married daughters, and be an interest vested in and paid to them respectively at the age of twenty-one, if sons, or at that age or marriage, if daughters, with benefit of survivorship between the children of each daughter, and with power to maintain them out of the interest of their respective fortunes, and to put out the sons in the world by an application of the whole or any part of the principal of their respective shares; and if my said daughters shall have no such children living at their respective deaths, the respective principals of their own fortunes shall be at their own disposal."

The testator died in 1848, and his widow in January, 1861.

At the time of the testator's death he had two sons and four daughters. One of the daughters afterwards married in the widow's lifetime.

The question was, whether the direction in the will as to the shares of daughters in the event of their marrying ought to be restricted to the case of marriage in the lifetime of the widow.

Mr. Ramadge, for the plaintiff (the executor), submitted that the direction applied to all marriages.

Mr. Lewin, for the unmarried daughters, argued in support of the more limited construction.

The following cases were referred to: *Edwards v. Edwards*, (a) *Da Costa v. Keir*, (b) *Galland v. *Leon- *760 ard*, (c) *Home v. Pillans*, (d) *Barker v. Cocks*, (e) *Clayton v. Lowe*, (g) *Cooper v. Cooper*, (h) *Randfield v. Randfield*. (i)

THE LORD JUSTICE TURNER. — The testator specifies the event in which the capital of his daughter's fortunes is to be at their own disposal, which is that of their leaving no children living at their deaths. I think that the gift over to the children of the daughters took effect, and that their shares cannot be paid over to the unmarried daughters.

The Lord Justice KNIGHT BRUCE concurred.

(a) 15 Beav. 357.

(b) 3 Russ. 360.

(c) 1 Swanst. 161.

(d) 2 M. & K. 15.

(e) 6 Beav. 82.

(g) 5 B. & Al. 636.

(h) 1 K. & J. 658.

(i) 2 De G. & J. 57.

Ex parte SAMUEL MOULSDALE MELLOR.

In the Matter of GEORGE DEANE and FREDERICK
YOULE, Bankrupts.

Ex parte JAMES SMITH and another.

In the same Matter.

1861. July 1, 12. August 6. 1862. February 14. Before the LORDS JUSTICES.

Two firms, one composed of A. and B., the other of A., B., and C., carried on business at Liverpool and Pernambuco, respectively. An English adjudication of bankruptcy was made against A. and B., and the holder of a bill drawn by A., B., and C. on A. and B. proved under it and received a dividend. Afterwards A., B., and C. failed in Pernambuco, and the same creditor proved and received dividends on his bill under that liquidation: *Held*, that he ought not to receive any further English dividend without refunding the Brazilian dividends, but could not be ordered to refund the English dividend already received.

THIS was an appeal from a decision of Mr. Commissioner PERRY of the Liverpool District Court of Bankruptcy, directing a proof to be expunged, on the ground that the appellants had made
* 761 double proof; * one proof having been made against the joint estate of the bankrupts, and another against the joint estate of them and a third partner under a liquidation which was in progress at Pernambuco.

In a former case under the same bankruptcy, reported in 1 De G. & J., (a) and on appeal to the House of Lords, in the 7th volume of the House of Lords' Cases, (b) it was decided that double proof was inadmissible.

The following are the short facts of the present case: The bankrupts carried on trade in partnership at Liverpool, and with a third partner, Alfred Phillips Youle, also carried on business at Pernambuco. The former were distinct, but both used the same style of Deane, Youle, & Co. On the 13th November, 1854, an adjudication of bankruptcy was made by the Court of Bankruptcy

(a) Page 257.

(b) Page 785, *nom.* Goldsmid v. Cazenove.

for the Liverpool district against George Deane and Frederick Youle, and James Cazenove was appointed official assignee, and James Smith and Samuel Mouldsdale Mellor were appointed creditors' assignees.

On the 29th November, 1854, Samuel Mellor and his then partner, Charles Hill Williams, who carried on business as merchants at Liverpool under the style of Mellor & Russell, proved against the joint estate of the bankrupts for 2584*l.* 17*s.* 6*d.* upon a bill of exchange drawn by the Brazilian firm of Deane, Youle, & Co. upon and accepted by the Liverpool firm of Deane, Youle, & Co., and in April, 1855, received a dividend of 258*l.* 9*s.* 9*d.* upon the proof.

On the 26th of June, 1855, the Pernambuco firm entered into a *concordata* (a) with their creditors there, * and under * 762 that *concordata* the representatives of the late firm of Mellor & Russell, which had in the mean time been dissolved, received under the *concordata* in 1855, 1856, 1857, and 1858, dividends amounting together to 784*l.* 9*s.* 2*d.*

In May, 1861, the assignees under the English bankruptcy served Mr. Mellor with a summons, dated the 12th April, 1861, to appear at the Liverpool Bankruptcy Court to be examined, and to show cause why the proof of debt for 2584*l.* 17*s.* 6*d.* should not be expunged.

Mr. Mellor appeared and objected to the jurisdiction of the Court to expunge the proof. The order under appeal was then made, and was as follows:—

“ This Court doth order that the proof made by the said Samuel Mouldsdale Mellor and his copartner, Charles Hill Williams, upon a bill of exchange dated the 17th day of June, 1854, drawn by the bankrupts' firm at Pernambuco upon and accepted by the bankrupts' firm at Liverpool, and indorsed over to the said Samuel Mouldsdale Mellor and Charles Hill Williams by George Fraser, Son, & Co., be expunged, unless they, the said Samuel Mouldsdale Mellor and Charles Hill Williams, do within one week pay over to the assignees of this estate the dividends received by them in respect of the said bill from the bankrupts' estate at Pernambuco, in which case the said proof shall stand upon the proceedings. And this Court doth order, that, in the event of the said proof being expunged in pursuance of this order, the costs of and attend-

ing this sitting shall be paid by the said Samuel Mouldsdale Mellor and Charles Hill Williams."

Mr. Little, in support of the appeal. — The proof was regular and correct, as was also the receipt of the dividend, and * 763 there is no ground for the * order to expunge the proof.

The commissioner had no jurisdiction to deal at all with the Pernambuco bankruptcy. The 183d section of the Bankruptcy Law Consolidation Act, under which the order was made, had no application to such a case as the present.

Mr. Bacon and *Mr. North*, for the assignees, referred to *Ex parte Dewdney*, (a) *Ex parte Burn*, (b) *Ex parte Roffey*, (c) *Ex parte Hornby*, (d) *Ex parte Soper*, (e) *Ex parte Chevalier de Mattos*; (g) and contended that as a creditor in such a case is restrained from receiving dividends on his proof here, unless he elects not to prove abroad, so proving abroad after receiving a dividend here is a ground for expunging the proof.

Their Lordships were of opinion, that when the original proof was made, under the Liverpool bankruptcy, viz., in November, 1854, it was justly and validly made, that when the first dividend was received in April, 1855, the proof remained valid, and that the dividend was properly paid; and their Lordships varied the commissioner's order, by declaring that Messrs. Mellor and Williams were not entitled to any dividend under the bankruptcy in England, other than that which they had already received; but that this order was made without prejudice to any question as to their title to the dividend already received in England of 258*l.* 9*s.* 9*d.*, or to any question as to their rights under the bankruptcy in Pernambuco.

The assignees then presented a petition to the district * 764 * Court, praying that the dividend of 258*l.* 9*s.* 9*d.* might be ordered to be refunded.

1862. February 14,

On the 6th January, 1862, the commissioner dismissed the

(a) 15 Ves. 479.

(d) De G. 69.

(b) 2 Ro. 55.

(e) 4 D. & C. 569.

(c) 19 Ves. 468.

(g) 1 M. & A. 345.

petition with costs, and an appeal from this order now came on for hearing.

Mr. Bacon and *Mr. North*, in support of the appeal, referred to *Ex parte Burn*, (a) *Ex parte Soper*, (b) *Ex parte Dewdney*, (c) *Ex parte Bolton*, (d) *Ex parte Roffey*, (e) *Ex parte Hornby*, (g) and *Goldsmid v. Cazenove*. (h)

Mr. W. M. James and *Mr. Little*, for the respondents, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — The right of the respondents to receive from the estate of the bankrupt the dividend which they have already received, was perfectly clear and plain. The question is, whether by reason of the subsequent receipt of a dividend from the estate under the process of bankruptcy, according to the laws of Pernambuco, he was bound to return to the credit of the English bankruptcy the whole or any part of the amount which he had so received. That amount exceeded the whole amount which he had received as a dividend under the bankruptcy at Liverpool. There may be a question as to the law of Brazil, but nothing has been proved or alleged to induce us to believe that the law of that country did not give *Mr. Mellor* a right in the circumstances of this case to receive * the * 765 dividends paid to him. If the law of Brazil does in effect give to a creditor who has received a dividend in this country a right to receive a dividend there also, there can be no pretence for taking it from him by the intervention of an English Court of justice. Upon every ground I think that this appeal fails, and that the learned commissioner has come to the correct conclusion. The appeal must, I think, be dismissed with costs.

THE LORD JUSTICE TURNER. — The sum of 258*l.* 9*s.* 9*d.* has been received by the respondents upon their proof under the bankruptcy in England, and they were under no obligation whatever with respect to that receipt. After they had so received it came

(a) 2 Rose, 55.

(b) 4 Dea. & Ch. 569.

(c) 15 Ves. 479.

(d) 2 Rose, 389; 8. C., Buck. 7.

(e) 19 Ves. 468.

(g) De G. 69.

(h) 7 H. L. Cas. 785.

the bankruptcy in Pernambuco, which has been held by the House of Lords to raise a case of election. That would, however, by no means create, as I apprehend, any obligation in the respondents to refund what they have rightly received as dividends here before any bankruptcy at Pernambuco had taken place. There is, as my learned brother has observed, nothing before the Court to show that the respondents were not entitled according to the law of Pernambuco to receive the dividend which they had received there; nor does there appear to be any case in this country bearing upon the question. Certainly there is none which creates an obligation upon the creditor to refund a dividend in a case of double proof of this description. In the case where a party comes to a Court in this country for indulgence, the Court may fairly put him on terms and require him to elect; but in the present instance the creditor has made no application to the Courts of this country; the application was made by others against him to compel him to refund that which he had rightfully received. There is no ground for the appeal, and it must be dismissed with costs.

* 766

* RANDFIELD v. RANDFIELD.

Ex parte GARLAND.

1861. June 21. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES. July 23, 24. August 6. Before the LORDS JUSTICES.

Where by the custom of a manor it was necessary for a copyhold tenant in remainder to be admitted and pay a fine on becoming entitled in possession, notwithstanding the admission of the tenant for life: *Held*, that the same rule ought to be applied to an executory devisee who became entitled on the defeasance of an estate in fee, although no custom applicable to that case was established. *Quere*, whether a new fine would have been payable in a manor where there was no such custom as to remainder-men, as to which the Lords Justices differed in opinion.

It is not according to the course of the Court to refuse liberty to try a right which is claimed against its receiver, unless it is clear that there is no foundation for the claim.

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY dismissing the petition of the lord of a manor who thereby

sought leave to seize *quousque* (notwithstanding the appointment of a receiver in the cause) for non-payment of a fine, his title to which was disputed.

William Randfield, the testator in the cause, by his will devised the copyhold property in question, which was holden of the manor of Dovercourt, in Essex, to his son William Carr Randfield, when he should have attained the age of twenty-one years, on condition that Ann Randfield, the testator's widow, should receive annually the sum of 120*l.* sterling, issuing out of rents of all the testator's houses, farms, cottages, gardens, lands, tithes, hereditaments, and premises, and subject to a proviso thus expressed: "But should the hand of death fall on my widow Ann Randfield and son William Carr Randfield, and my having no other children, or my son any issue lawfully begotten, my will is then, that should he leave a widow, that she shall receive the annual sum of 50*l.* sterling during her widowhood out of my real estates, as before-mentioned, the residue then to be equally divided, share and share alike, after paying such *legacies as I may hereafter name; the *767 division of property to be between my late brother Richard Randfield's surviving children, and my sister Jessey Warren's children, my sister Rachael Squirrell's children, my niece Grace Beeston, and my niece Sarah Stuart, they paying all my son's just debts, funeral expenses, and demands, or my wife's, should she be the longest liver."

The testator died on the 29th of February, 1844, leaving William Carr Randfield his only child.

At a court baron held for the manor of Dovercourt on the 12th of December, 1844, William Carr Randfield was admitted tenant in fee of the copyholds under the testator's will, and paid a full fine.

William Carr Randfield died in 1856, having devised all his property to his wife, the plaintiff.

By an order made in the cause on the 20th of November, 1856, a receiver was appointed of the real and personal property of the testator.

By a decree made by Lord CRANWORTH (a) on appeal from the decision of Vice-Chancellor KINDERSLEY, and affirmed by the House of Lords, (b) it was declared that the son took an absolute interest, subject to be divested in the events, which had happened, of the

(a) 2 De G. & J. 57.

(b) 8 H. L. Cas. 225.

testator having had no other child, and of the son himself dying without having had a child.

The lord of the manor then presented the petition on which the order under appeal was made, praying that he might be at
 * 768 liberty, notwithstanding the appointment of * the receiver, to enter into and upon and to receive the profits of the copyhold premises for want of admission of a tenant.

The case is reported below in the 1st vol. of Messrs. Drewry & Smale's Reports. (a) .

June 21.

On the appeal coming on this day before the Lord Chancellor (Lord CAMPBELL) and the Lords Justices, their Lordships considered that as the evidence then stood the lord ought to be permitted to seize the rents and profits for the purpose of trying the right to the fine. It was, however, ultimately agreed that the question should be tried before the Court of Appeal in Chancery instead of at law, and the appeal was ordered to stand over, with liberty to amend the petition and to file fresh affidavits on both sides as to the custom of the manor, but without prejudice to any right of appeal to the House of Lords.

The petition was accordingly amended ; and, when so amended, stated that by the custom of the manor of Dovercourt with Harwich all persons becoming entitled in immediate succession to any estate of inheritance or for life in a copyhold tenement parcel of the said manor upon or by reason of determination of any particular or prior estate for life or of inheritance, absolute or defeasible, are required to take admittance to such tenements from the lord of the said manor or his steward, and to pay the customary fines thereupon demandable upon every succession and admittance to any estate whatsoever in tenements holden by copy of court-roll of the said manor. Evidence was produced in support of
 * 769 * this statement, but no instance was shown of a devolution by way of executory devise.

July 23, 24.

The case now came on for argument on the amended petition.

Mr. W. M. James and *Mr. Prendergast*, for the lord. — Independently of the particular custom, the lord is entitled, for there is no

(a) Page 310.

analogy between a remainder-man and an executory devisee. In the former case the admission of the tenant for life is the admission of the remainder-man in the absence of a custom to the contrary, which custom, however, is a good one. Watkins on Copyholds, (a) *Brown's Case*. (b) Even a contingent remainder is not within the rule, a contingent remainder-man not being in the seisin. *Doe v. Tomkins*, (c) *Rider v. Wood*. (d) But an executory devisee comes in by a new estate. The widow of the first devisee is dowable. The seisin of the first taker is not the seisin of the executory devisee. They referred to *Phyper v. Eburn*, (e) *Moody v. King*, (g) *Doe v. Hutton*, (h) *Church v. Mundy*. (i)

Mr. Baily, Mr. Glasse, Mr. Dickinson, Mr. Shebbeare, and Mr. Kay, for the several respondents. — There is no substantial difference between a remainder-man and an executory devisee. Unless a special custom is proved, applicable to the particular instance, no new fine is payable by either. And the evidence here of special custom does not extend to an executory devise, which is therefore left to the ordinary law.

* They referred to *Dean of Ely v. Caldecot*, (k) *Lord Kensington v. Mansell*, (l) *King v. Lord of Manor of Oundle*, (m) *Glasse v. Richardson*, (n) *Doe v. Jenney*, (o) *Doe v. Lawes*. (p)

Mr. James, in reply.

Judgment reserved.

August 6.

THE LORD JUSTICE KNIGHT BRUCE. — The point on which, as I understand, we have been asked in this case to pronounce an opinion may, I think, be stated thus: A copyholder by will effectually gives his copyhold property to A. in fee, but subject to

(a) Page 296.

(b) 4 Rep. 21 a.

(c) 11 East, 185.

(d) 1 K. & J. 644.

(e) 3 Bing. N. C. 250.

(g) 2 Bing. 447.

(h) 3 Bos. & Pul. 652.

(i) 12 Ves. 426.

(k) 8 Bing. 439.

(l) 13 Ves. 240.

(m) 1 Ad. & El. 283.

(n) 2 De G., M. & G. 658.

(o) 5 East, 522.

(p) 7 Ad. & El. 195.

an executory devise contained in the same will. By that executory devise the property, upon the happening of a contingent event specified, is directed to go from A. and his heirs and given to B. and his heirs. A. and B. survive the testator, and A. under the will receives admission from the lord, upon which the customary fine is paid to him by A. The contingent event mentioned in the will afterwards happens, by the death of A. in a certain state of circumstances, on which the estate of A. and his heirs is defeated, and the property under the will passes to B., whom thereupon the lord requires to be admitted and pay a fine upon the admission. This claim B. resists, contending that the admission of A. renders any admission of B. unnecessary, and dispenses with it and with the fine demanded. Which of the two is right? If there is any

analogy between such a case of executory devise as I have * 771 mentioned and a case of a particular * estate with remainders, that analogy seems in the present instance to be in the lord's favour, inasmuch as there is evidence before us showing, in my opinion, that by the custom of the manor under consideration, the admission of the owner of the first particular estate does not operate as an admission of a remainder-man, or exempt him from a fresh admission and the payment of a fresh fine upon the remainder coming into possession. There may or may not exist an analogy between the cases. However this may be, there is not, or at least in any other sense there is not, shown to be any specific custom in the manor applying to admission or fine in an instance such as that before us, and the question must, I apprehend, be decided, if not on the analogy that has been mentioned, on general principles, and those are, I conceive, favourable to the lord's claim, as is my opinion. The estate of A. has ceased to exist; it has been defeated and destroyed, and that of B. has become substituted for it; nor do I consider that A. can properly be deemed to have been admitted on behalf of all claiming under the will.

THE LORD JUSTICE TURNER. — This was the case of an application to the Court by the lord of the manor for liberty to enter and take the profits of a copyhold estate which is in the possession of the Court by its receiver, the lord claiming to be entitled to seize the estate for default of an executory devisee coming in to be admitted. The Vice-Chancellor, Sir RICHARD KINDERSLEY, being of

opinion that the devisee was not bound to take admittance, refused the application with costs; and the appeal before the Court is from his Honor's decision. That decision appears to me to be exceedingly strong, for there can be no doubt that if the Court was not in possession of the estate by its receiver, the lord * 772 would be entitled to seize, in order to try the question whether the devisee was bound to take admittance or not; and it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim. The Vice-Chancellor's decision went, therefore, the full length of saying that the lord had no possible claim; and his Honor, indeed, has so put the case in giving judgment. I am certainly not prepared to go that length; and unless, therefore, all the parties interested had been desirous that we should decide the question of right, and had been content to abide by our opinion upon it, subject of course to an appeal to the House of Lords, I think that leave must have been given to the lord to seize, in order that the question of right might be tried.

But I understand that all the parties interested are desirous of having our opinion upon the question; and that being so, I am prepared to state the conclusion at which I have arrived upon it. The case is in substance this: William Randfield, a copyhold tenant of the manor, devised his copyhold hereditaments held of the manor to his son William Carr Randfield in fee, with an executory devise over in the event of the son dying without having had a child. The son was admitted to the copyhold hereditaments upon the death of his father, to hold to him and his heirs, according to the form and effect of the will; and upon this admission he paid a full fine. He has since died without having had a child, so that the executory devise has taken effect; and the question is, whether his admission was an admission of the persons entitled under the executory devise, or whether those persons ought now to come in and be admitted and pay a fine to the lord for their admission. It is with a view to enforce this admission that the lord claims the * right to seize; and it is this claim on his part which the * 773 Vice-Chancellor has considered to be wholly untenable. Looking at the case without reference to any special custom of this manor, I am disposed to agree with the Vice-Chancellor's conclusion. William Carr Randfield, the son, having been admitted to hold to

him, his heirs and assigns, according to the form and effect of the will, I think that this was an admission to the entire fee devised by the will, and not merely to the determinable interest which he himself took in that fee. Consequently, when the executory devise came into operation, the persons entitled under it took the same estate to which he stood admitted; thus bringing the case within the acknowledged rule, that the admission of a tenant for life is the admission of those in remainder. The foundation of that rule may probably be this, that the fee, when granted, followed the uses of the surrender which the lord accepted, each succeeding *cestui que trust* taking under the same grant, and, in that sense, the same estate. I cannot, therefore, see my way to distinguish between the case of a remainder and the case of an executory devise.

It is said that a contingent remainder-man is not within the seisin, and that *à fortiori*, an executory devisee cannot be within it. But the contingent remainder-man comes into the seisin when the remainder becomes vested; and so does the executory devisee when the event happens on which the devise over is to take effect.

Thus far, therefore, I am disposed to agree with the Vice-Chancellor, although, with deference to his Honor, I should hardly, in the state of the evidence before him, have ventured to make the order which he made without some further inquiry into the custom of the manor. It is upon that custom that the question

* 774 now before us * must, as I think, be decided. The evidence upon this which has been brought before us goes far beyond that which was before the Vice-Chancellor; and I think that it is to be collected from it that it is the custom of this manor for devisees in remainder to come in and be admitted and pay a full fine upon their admission. This, I think, shows that according to the custom of the manor a devisee in remainder (though he may take the same estate as was taken by the prior devisee, in the sense of taking the estate under the same grant from the lord) takes it under the obligation of their being a fresh recognition of the tenancy by a new admittance, and if this be so as to an estate in remainder, it must be equally so as to an executory devise, the custom showing that an original grant by the lord was made, subject to the condition that each succeeding tenant should anew recognize the tenancy. In my opinion, therefore, grounding myself entirely upon the custom, and desiring not to be understood as giving any final opinion upon the general question to which I

first adverted, it not being necessary to do so, I think that the lord is entitled to require the persons claiming under the executory devise to come in and be admitted; and that unless some arrangement can be made for payment of the fine, leave must be given to the lord to seize *quousque*.

* FLETCHER v. FLETCHER

* 775

1861. July 28. Before the LORDS JUSTICES.

A testator gave his residuary, real, and personal estate upon trust, out of the income to pay an annuity to his widow for her life, and after her death he directed that the trustees should hold the proceeds of the trust property in trust, to divide them among his children on their attaining twenty-one (with "full powers of maintenance and advancement" "in the mean time"), and the issue of such children, if dead; and in case there should be no child of the testator living at his death, upon trust for such persons who at "the failure or determination of the preceding trusts" would be entitled under the Statute of Distributions as his next of kin to the trust estate if he had "then died possessed thereof intestate and without leaving any wife" him surviving: *Held*, that the sole next of kin at the time of the testator's own death was the person entitled under the ultimate bequest.

THIS was an appeal from the decision of Vice-Chancellor JAMES in a suit in the Court of Chancery of Lancaster upon the construction of a will.

The testator, Samuel Fletcher (a solicitor of Manchester), by his will dated December 1st, 1856, disposed of his residuary estate in the following words:—

"And as to the remainder of such trust-estate and premises upon trust to sell and convert into money such my real and such part of my personal estate as shall not consist of money or securities for money, and after payment thereof of my debts, funeral and testamentary expenses and legacies, to invest the residue in the public stocks or funds, or at interest on government or real securities in England or Wales, but not elsewhere, and out of the dividends, interest, or annual produce arising therefrom, upon trust to pay unto my said dear wife during her life an annuity of

500*l.*, payable quarterly at Lady-day, Midsummer-day, Michaelmas-day and Christmas-day, the first of such quarterly payments to be made on the first of the said quarter-days which shall happen next after my decease; and I direct that the said annuity shall be for the separate use of my said wife, and free from the debts, engagements, and control of any husband with whom she

* 776 may intermarry, so that her receipts alone * shall be sufficient discharges; and that she shall not have power to deprive herself thereof in anticipation; and after the decease of my said wife, I direct that my said trustees shall stand possessed of the residue of my said estate and the stocks, funds, and securities whereon the same shall be invested in trust to pay and divide the same unto and equally between and amongst all and every my child and children if more than one, and if but one to such one solely on their, his, or her attaining the age of twenty-one years (with full powers of maintenance and advancement, at the discretion of my said trustees in the mean time), and the issue of such child or children if dead, in equal shares and proportions, and in case there shall be no child, or the issue of any child of my body living at the time of my decease, then upon trust for such person or persons who at the determination or failure of the preceding trusts of this my will would be entitled under the Statute of Distributions to the said trust-estate and premises as my next of kin, in case I had then died possessed thereof intestate and without leaving any wife me surviving, and in the same shares and proportions as such persons, if more than one, would be entitled thereto by virtue of the same statute."

The testator died on the 28th of September, 1858, leaving him surviving his widow, but no child or issue of any child.* His property consisted of valuable real estate as well as personal, and was in round numbers to the amount of about 30,000*l.*, so that there was a large surplus after making provision for the annuity given to his wife.

The testator's next of kin and heir-at-law respectively claimed, the first the whole of the property, the second the real estates, subject to the charge in favour of the wife, and (as a minor claim) undisposed of income during the wife's life. The

* 777 trustees supported the claims * of a contingent class, to be ascertained at the death of the widow, to the whole residue.

The Vice-Chancellor, after stating to the above effect, said :—

After a careful consideration of the will, I am compelled, though with regret, to come to the conclusion that the testator has effectually made what cannot but be felt to be a very capricious disposition of his residuary estate. I was pressed in the argument with the numerous recent cases which have given to the words “next of kin according to the statute” the meaning of real and true next of kin; that is, those ascertained at the death of the testator, notwithstanding the apparent absurdity of the intention, having regard to the previous gifts and the estate of the testator’s family within his own knowledge at the making of his will, and notwithstanding words of futurity. But all those cases proceeded on this, that there was not sufficient to introduce by way of conjectural construction the words which the testator has used here: the plainest words in which it is possible to express a class, not the real and true next of kin, but persons who would be the next of kin at a day subsequent to the death, if the testator had lived to that day and then died. The question resolves itself into the meaning of the words “at the determination or failure of the preceding trusts of this my will,” and whether, by any possible construction, I can confine these words to the trusts in favour of children and issue, to the exclusion of the trusts in favour of the wife. I cannot do this. The words seem to me too plain to be controlled. The gift to the wife is one of the preceding trusts, and the gift itself to the next of kin is part of the sentence, the governing introductory words of which are, “and after the decease of my said wife.” If the property had only been just sufficient to provide for the wife’s annuity, so that the whole must have been kept intact during her life, I * apprehend that no one would have seriously * 778 questioned the true construction of the gift. The accident that the testator’s property at his death was so large cannot of course affect the construction, and it is obvious that the testator contemplated only one division of the residue as one entire fund to be made after the wife’s death. I feel bound to act upon what I conceive to be the plain meaning of the will as it would stand striking out the gift to children and issue (there being none), and then it would run, “and after the death of my wife upon trust for the persons who would be my next of kin in case I had then died intestate,” &c. I can make no difference between the *corpus* and

the income. The real estates are directed to be sold, and their produce blended with the personalty in one common fund, and the executory bequest of that common fund carries with it all the income not required for satisfying the wife's annuity. The only directions which I can make therefore are, to direct the money not in the Court to be brought into Court; to direct the remaining real estates to be sold; the accounts to be continued against the trustees; the 500*l.* a year to be paid to the widow out of the income of the trust-estate; and the surplus to be accumulated, with liberty to apply at her death. As there are estates to be sold, it will be necessary further to reserve further directions. All parties to have their costs as between solicitor and client (no one objecting), and the trustees any charges and expenses properly incurred.

Mr. Little and *Mr. E. R. Turner*, for the plaintiff, the sole next of kin, who was the appellant. — The word “failure” must mean the death of the children in the testator's lifetime, for the provision refers to the whole *corpus* of the fund and not to the income, and there is no trust applying to the whole fund except that for the children. There is no trust for accumulation.

* 779 * Any children or child surviving the testator would have taken the whole trust property, subject only to the widow's life annuity; *Moss v. Dunlop*. (a) According to the construction put upon the will by the decree under appeal, if a child had survived the testator and died in the widow's lifetime, there would have been a simple intestacy. Moreover, that construction strikes out of the will the words “without leaving a wife,” which have no force or operation according to that construction.

Mr. Eddis, for the widow.

Mr. Sandys, for the heir-at-law, referred to *Watson v. Hayes*; (b) *Flint v. Warren*. (c)

Mr. Giffard and *Mr. Bury*, for the trustees. — The words “as if I had then died” cannot refer to the actual time of the testator's death. It clearly designates a subsequent period, and the construction contended for by the appellant strikes the word “then” out of the will. The word “determination” is inapplicable to the

(a) *Johns*. 490.

(b) 5 *Myl. & Cr.* 125.

(c) 15 *Sim.* 626.

limitation to the children, which was absolute on their surviving the testator. The words are clear and precise, and not affected by any controlling context. If even they should be considered as making a capricious disposition, that would not be reason enough for departing from their ordinary meaning. But if the fund was only sufficient to keep down the annuity, there would be nothing even unusual in the provision, and the construction cannot be governed by the amount of the fund. They referred to *Ex parte Bartholomew* (a) and *Briden v. Hewlett*. (b)

Mr. Little, in reply.

* THE LORD JUSTICE KNIGHT BRUCE. — With deference to * 780 the learned Vice-Chancellor, I think that, subject to the annuity and to the legacies, the whole property is given, in the event which has happened, absolutely and at once to the next of kin of the testator at the time of his death, and that the plaintiff is therefore entitled.

THE LORD JUSTICE TURNER. — I am also unable to concur with the learned Vice-Chancellor. There is first a gift of the entire fund to the trustees, upon trust out of the income to pay the annuity to the widow. The testator, I think, referred to the whole fund when he said, "and after the decease of my said wife I direct that my said trustees shall stand possessed of the residue of my said estate," &c. The whole fund is given throughout the will. The question is, whether the words "after the decease of my wife" are to receive a strict construction. Now there is a provision for the maintenance of the children, which, as there is no trust for accumulation, must have been intended to take effect during her life, so that the words cannot receive a strict construction. The testator must be taken to have contemplated his wife surviving him, according to the rule that the death of a legatee in the testator's lifetime is not considered to be contemplated, unless no other construction will satisfy the words; and the words carefully excluding the wife from the ultimate gift point to a distribution in her lifetime, and show that the testator meant the whole fund to go to

(a) 1 Mac. & G. 354.

(b) 2 Myl. & K. 90.

those who were his next of kin at the time of his own death. If there had been children, they would have taken vested interests liable to be divested.

The decree will be varied by declaring that the next of kin at the death of the testator are entitled.

[610]

AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ABANDONMENT. See RAILWAY COMPANY.

ABROAD. See JURISDICTION.

ACCOUNT.

An agreement was entered into between K. and P. that K. should take out a patent for purifying paraffine and assign it to P.; that P. thereupon would work it for fourteen years, if it could be so long worked at a profit; would not purify paraffine by any other process, and would pay to K. a royalty upon all purified paraffine sold; that P. would keep accurate account of all paraffine purified according to the patent, render them half-yearly and verify them, and that the provisions of this agreement, and all other provisions usual and proper in such deeds, should be incorporated in the deed of assignment of the patent, such deed to be prepared by counsel to be agreed on by the solicitors of the parties. The patent was taken out, and P. commenced working under it, but shortly afterwards abandoned the use of the process, alleging that it could not be worked at a profit, and refused to pay any royalty. K. thereupon brought an action at law for royalties and recovered judgment. Pending this action, P. gave notice to determine the agreement, because the invention could not be worked to a profit. K., after obtaining judgment, filed his bill, asking for an account of subsequent royalties, an injunction to restrain the defendant from purifying paraffine under any other process, and for a reference to Chambers to settle a proper deed of assignment, or if the Court should hold the agreement to have been determined, then for relief against the defendant as an infringer * of the patent. *Held*, by the Lord Justice TURNER, that in a case of this nature it was in the discretion of the Court whether it would direct an account or leave the parties to their remedies at law, and that, in the present case, the account being only a part of an agreement which the Court could not wholly enforce, the plaintiff ought to be left to his remedy at law, and that for the same reason the execution of the assignment ought not to be decreed. — *Kernot v. Potter*; *Potter v. Kernot*, 447.

ACCOUNTANT. See DOCUMENTS.

ADJUDICATION. See ANNULING.

AFFIDAVIT. See INTERPLEADER.

AGENT. See DOCUMENTS. LACHES.

AGREEMENT. See ACCOUNT. JURISDICTION. SPECIFIC PERFORMANCE.
VENDOR AND PURCHASER.

ALIENATION. See INJUNCTION.

AMENDING BILL. See COSTS.

ANNULING.

Under a petition for protection presented according to the 211th section of "The Bankrupt Law Consolidation Act, 1849," the petitioner was adjudicated bankrupt on February 11th, assignees were chosen on February 29th. On May 1st, after the proceedings had advanced as far as the last examination, creditors applied to have the adjudication annulled for the purpose of a new one being obtained on a creditor's petition, under which dealings might be overreached by relation: *Held*, notwithstanding the length of time from the adjudication, and the opposition of the bankrupts, that the order ought to have been made, and the same was made accordingly on appeal, the assignees consenting. — *Ex parte Roberts*, 747.

See CREDITORS' DEED. INSOLVENCY. MORTGAGE. PARTNERSHIP. RE-
FUNDING.

APPEAL. See PRACTICE, 2. STAMP.

ARBITRATION. See AWARD. DEFENCE OF REALM ACT.

ARREST. See BANKRUPT.

ASSETS. See LACHES.

* 783 * AWARD.

In proceedings under a reference to arbitration involving complicated accounts relating to a business, the arbitrator excluded the son of one of the parties who had been a clerk in the business, and whose assistance the father desired in the proceedings as to the accounts. He also excluded a shorthand writer whom the same party wished to employ to take notes of the proceedings. No reason justifying such exclusion being shown: *Held*, that the award ought to be set aside, and that the party did not, by attending the further proceedings under the reference, waive his right to take the objection.

At the last meeting under the reference, no notice having been given that it was to be the last meeting, the solicitor to the arbitrator stated that he should issue notices for another meeting. The award was signed on the next day. *Per* the Lord Justice TURNER, the award was, under these circumstances, liable to be set aside. — *In re Haigh; Haigh v. Haigh*, 157.

BANK-NOTES. See INJUNCTION.

BANKRUPT.

1. The final examination of a bankrupt was adjourned from the 6th of November to the 3d of December. On the 29th of November, the commis-

sioner issued a Ba. certificate under sect. 257 of the Bankrupt Law Consolidation Act, declaring that the bankrupt was not protected from process against his person. By virtue of this certificate, a creditor sued out a *ca. sa.*, and on the 1st of December arrested the bankrupt. After the 3d of December, the commissioner issued another Ba. certificate, and, by virtue of it, another creditor sued out a *ca. sa.* and lodged a detainer against the bankrupt.

Held, that the commissioner had no authority to issue a Ba. certificate, before the expiration of the time allowed to the bankrupt for finishing his examination, the privilege from arrest given by sect. 112 of the Bankrupt Law Consolidation Act during that period being absolute, and that the arrest on the 1st of December was therefore illegal.

Held, further, that while the bankrupt was illegally imprisoned under this arrest, he could not be lawfully detained under the second Ba. certificate, though granted after the 3d of December. — *Ex parte Freston*; *In re Freston*, 612.

2. M., a tanner, employed as his factors S. & Co., a firm in high repute, one of the members of which was his brother, and they were in the habit of accommodating * him with money to a large amount. * 784 He never took stock and did not accurately know the state of his affairs. In 1857, there was a panic in the leather trade and his stock suffered a heavy depreciation, from which it never recovered. M. fully believed himself to be solvent, though he was aware that but for the accommodation afforded him by S. & Co., he must have stopped payment, and he went on trading until July, 1860, when S. & Co. stopped payment. M. then investigated his affairs and found that he had been insolvent ever since the end of 1858. He then at once stopped payment and presented a petition for arrangement with his creditors under sects. 211–223 of the Bankrupt Act of 1849.

Held, by the Lord Chancellor and the Lord Justice KNIGHT BRUCE, that M. could not be considered to have contracted his debts “without reasonable probability at the time of contract of being able to pay them,” for that this means without a reasonable probability, reasonably supposed by the trader to exist at the time of contract, that he would be able to pay; and that having regard to his reasonably grounded expectation that S. & Co. would enable him to meet his engagements, he might reasonably believe that he would be able to pay. But *per* the Lord Justice TURNER, whether the “reasonable probability” ought to be measured by the means and credit of the petitioner himself, having regard to the extent to which a prudent man would trust him in the course of business, and not by the help derived from friends.

Held, by the whole Court, that the trader had not delayed the presentation of his petition “longer than was excusable,” inasmuch that he continued to trade in the belief that, with the assistance of S. & Co., he would be able to carry it on with ultimate success; though, if he had investigated his affairs, it would have appeared that his debts exceeded his assets for more than two years before his stoppage. — *Ex parte Mortimore*; *In re Mortimore*, 599.

BILL. See COSTS. DAMAGES. DEMURRER.. DISMISSAL.
BILLS OF EXCHANGE.

A trader and a firm of traders having agreed to assist one another by mutual advances, the following dealings took place between them. The trader delivered to the firm several acceptances and a quantity of wool, and procured bills drawn by the firm to be accepted by strangers on the trader's indemnity. He also made payments on account of the firm. The firm on their part advanced to him cash to the amount of 5000*l.* and delivered to him several acceptances, exceeding the amount of the acceptances *delivered and procured by the trader as above mentioned. By a contemporaneous memorandum, signed by the trader, he stated that he had consigned the wool in consideration of the advance of 5000*l.*, and that the firm were to be at liberty to sell it if he should not, when called upon, reimburse their "advances." The acceptances were chiefly those of strangers. It appeared, upon the whole of the evidence, that the wool was deposited in pursuance of an agreement that it was to be a security for all the advances made by the firm, and there was nothing in the evidence to show that the cash received by the firm upon the discount of the acceptances received by them from and on the indemnity of the trader did not exceed the cash advance of 5000*l.*

* 785

On the affairs of the firm and of the trader being wound up, under arrangements analogous to the bankruptcy law: *Held*, that the holders of the bills delivered by the firm to the trader were entitled ratably to the proceeds of the wool, according to the principle of *Ex parte Waring* (19 Ves. 345); *Ex parte Ackroyd*, 726.

BONUS. See LEGACY.

CALL. See INSOLVENCY.

CAPITAL. See LEGACY.

CERTIFICATE. See BANKRUPT. INSOLVENCY. PRACTICE, 2.

CESSIO BONORUM. See CREDITORS' DEED.

CHAMBERS.

An order having been made for winding up a company, A. was proposed as official manager by one contributory, B. by another. The chief clerk decided to appoint B., and refused an application by A.'s proposer to adjourn the question to be considered by the Judge personally. The Judge, on being applied to, refused to disturb the appointment unless it was shown that B. was an unfit person. *Held*, on appeal, that as the Judge had not personally decided the question which of the two persons proposed was more eligible, the appointment ought to be discharged without prejudice to the Judge's reappointing B., if in the exercise of his discretion he should think fit to do so.

Per the Lord Justice TURNER: In proceedings in Chambers every party has the unqualified right to have his case heard by the Judge personally if he requires it; and the chief clerk cannot refuse an * application to have it so heard. — *In re The Agriculturist Insurance Company*, 194.

* 766

CHILDREN. See WILL, 4, 7.

CHURCH BUILDING ACTS.

The exceptions expressed in the 18 & 19 Vict. c. 120, § 90, and 19 & 20 Vict. c. 112, § 3 (The Metropolis Local Management Acts), do not exempt the ecclesiastical commissioners acting under the Church Building Acts from the provisions of the first-mentioned Act, and vestries have, under the first-mentioned Act, authority to pull down such portions of churches as well as of other buildings as transgress the provisions of that Act. — *The Ecclesiastical Commissioners for England v. The Vestry of the Parish of St. James and St. John, Clerkenwell*, 688.

CLASS. See WILL, 2, 4, 7.

COMPANY. See CONTRIBUTORY.

COMPENSATION. See VENDOR AND PURCHASER.

COMPOSITION. See CREDITORS' DEED. STATUTE OF LIMITATIONS.

CONCEALMENT. See SPECIFIC PERFORMANCE.

CONDITIONS OF SALE. See VENDOR AND PURCHASER.

CONFLICT OF LAW. See JURISDICTION.

CONTINGENT INTEREST. See WILL.

CONTRACT. See JURISDICTION.

CONTRIBUTORY.

Where an applicant for shares in a company who had paid a deposit, and agreed to accept shares when allotted, wrote to the company before allotment, revoking his application: *Held*, he ought not to be on the list of contributories. — *Gledhill's Case*, 713.

See INSOLVENCY. WINDING-UP ACTS.

CONVEYANCE. See VENDOR AND PURCHASER.

COPYHOLD.

Where by the custom of a manor it was necessary for a tenant in remainder of a copyhold to be admitted and pay a fine on becoming entitled in possession, notwithstanding the admission of the tenant for life: *Held*, that the same rule ought to be applied to an executory devisee, although no custom applicable to that case was established. *Quære*, whether a new fine would have been payable in a manor in which there was no such * custom as to remainder-men, as to which the Lords Jus- * 787 tices differed in opinion. It is not according to the course of the Court to refuse liberty to try a right which is claimed against its receivers, unless it is clear that there is no foundation for the claim. — *Randfield v. Randfield*, 766.

CORONER.

Removal of a coroner under 23 & 24 Vict. c. 111. — *In the Matter of Ward*, 700.

COSTS.

One of several co-plaintiffs obtained an order giving the plaintiffs leave to amend their bill by striking out his name on his giving security for the costs up to and including the summons. The bill was accordingly amended and was afterwards dismissed with costs for want of prosecution. *Held*, on the appeal of one of the remaining plaintiffs from both

orders, that the defendants ought not to be further troubled with the suit, but that the costs should extend to the time of the actual amendment as regarded the first-mentioned plaintiff, and that the order should be without prejudice to any question between the co-plaintiffs. — *Drake v. Symes*, 491.

See CREDITOR'S DEED. INFANT. TAXATION.

COUNSEL. See PRACTICE, 2.

COVENANT. See INJUNCTION. LEASE. VENDOR AND PURCHASER, 3.

CREDITORS' DEED.

1. Under a composition deed, the benefits of which were in terms limited to creditors who should come in and accede to the deed within a limited time, certain creditors, who neither assented to nor dissented from the deed during such time were, under the circumstances, afterwards admitted to share in the benefit of the composition, together with those who had acceded before the expiration of the stipulated time, although the deed contained no release or stipulation that the dividend was to be taken in full satisfaction of the debts: *Held* that satisfaction ought to be inferred as the deed constitutes a *cessio bonorum*. — *Whitmore v. Turquand*, 107.
2. The Court has jurisdiction to allow, and will in a proper case allow, out of a bankrupt's estate the expenses of the trustees of a creditors' deed incurred in executing the trusts. — *Ex parte Tomlinson*. *In re Boyce*, 745.

CROSS REMAINDER. See WILL, 6.

CURTESY. See HUSBAND AND WIFE, 2.

CUSTOM. See COPYHOLD.

* 788 * DAMAGES.

1. The plaintiff filed a bill to restrain the defendant from injuring his farms by copper smoke, and also brought an action for damages. Before trial of the action an order was made by consent in the suit that the defendant should purchase the plaintiff's interest in the farms at a price to be ascertained and certified by a surveyor, and that the plaintiff should be at liberty to claim damages in the action down to the date of the surveyor's certificate. A dispute took place before the surveyor whether the valuation ought to be according to the existing state of the farms or according to their state before they were injured by the copper smoke. The parties being unable to agree, the surveyor stated that he would hear arguments and decide the question of principle. The Vice-Chancellor then made an order, declaring that the valuation ought to be according to the existing state of the farms. *Held*, on appeal, that such declaration ought not to have been made, and it was discharged without prejudice to any question. — *Houghton v. Bankart*, 16.
2. An undertaking given by a plaintiff upon obtaining an injunction, to abide by any order the Court may thereafter make as to any damages that

may be occasioned to the defendants by the injunction, remains in force notwithstanding the dismissal of the bill.

An inquiry as to damages will in such a case be granted where the plaintiff's case fails by reason of his having no right to interfere with the Act which he seeks to restrain, though the defendant was a mere trespasser. — *Newby v. Harrison*, 287.

DEBT. See LACHES.

DEED (SETTING ASIDE). See LACHES.

DEFENCE OF REALM ACT.

Where, pending an arbitration to settle the amount of compensation to be paid by the ordnance department under the provisions of the defence of the Realm Act, 1842, for damage occasioned by their proceedings under that Act to an ancient flour mill standing on a part of settled estates, an owner of a limited interest in the estates, at his own expense, repaired the damage, by the erection of works and buildings of a permanent character: *Held*, that an order might be made in Chambers, under the Acts, for payment of the sum awarded for compensation in part reimbursement. — *Ex parte The Duke of Wellington*, 13.

DEMONSTRATIVE LEGACY. See LEGACY.

DEMURRER.

The plaintiff entered into an agreement with the principal defendant to sell to him certain leasehold property, in consideration of a debt * due from the plaintiff to the defendant, with a stipulation giving * 789 to the plaintiff the right of repurchase on payment of a specified sum, with interest, on a specified day, or so much of the repurchase money as should then be "due and owing, after deducting the net proceeds of all sales (if any) which should be made in the mean time, including all moneys laid out in repairs or improvements." The agreement provided that time should be considered of the essence of the permission to repurchase, and that the same should under no circumstances be exercisable after the specified day, any rule of equity to the contrary notwithstanding. The bill, which was filed one day before the expiration of the time for repurchase, alleged that the principal defendant had sold portions of the property to an amount more than sufficient or very nearly sufficient to pay the amount of the repurchase money, but had only rendered insufficient and unsatisfactory accounts of his receipts, and refused to give any others. The bill also stated that another defendant (who was the solicitor to the principal defendant) claimed to be and was, under agreements, deeds, and assurances, the particulars whereof were unknown to the plaintiff, interested in the premises comprised in the agreement, and that this defendant alleged that he was, in fact, a necessary party to the suit. The prayer was for an account of the moneys received by the principal defendant on account of the sales, and of what was due to him in respect thereof, and that he might account for and set off against his debt the sums received by him, and that the plaintiff, who offered to pay the balance (if any), might be at liberty to repurchase, notwithstanding the expiration of the

time. On appeal from an order overruling the demurrer of the principal defendant, and allowing that of the other: *Held*, —

1. That a sufficient case was alleged for some relief against the principal defendant.
2. That there was a sufficient allegation of interest in the other defendant, and that consequently neither demurrer was sustainable. — *Ponsford v. Hankey*, 544.

See DISMISSAL. INTERPLEADER. PLEA.

DEPOSIT. See MORTGAGE. RAILWAY COMPANY.

DESERTION. See HUSBAND AND WIFE.

DETAINER. See BANKRUPT.

DEVISE. See LACHES.

DISCHARGE. See INSOLVENCY.

* 790 * DISMISSAL.

A., tenant in tail in remainder, mortgaged the estate by demise to B. for ninety-nine years if A. should so long live. A. next by deed not enrolled, conveyed to X. and Y., their heirs and assigns, by way of security. Sometime afterwards, in 1849, A., with the consent of the protector, disentailed the estate, and as part of the same transaction and for valuable consideration, the estate was by a separate deed settled (subject to the prior life-estate) to the use of A. for life, remainder to G. W. in fee, G. W. covenanting to pay B.'s mortgage. A. next, suppressing all the above transactions except the security to X. and Y., borrowed money from C., who paid off X. and Y., and the estate was conveyed to him by A., X., and Y. by way of security, the deed being enrolled as a disentailing assurance. G. W. afterwards, without notice of C.'s security, bought A.'s life-estate, and took a transfer of B.'s security to a trustee for himself. C. filed a bill against G. W., alleging that the deed of 1849 had the effect of enlarging the estate of X. and Y. into an absolute fee, which was now vested in C., and that the settlement of 1849, so far as it was for the benefit of G. W., was voluntary and void as against C., and that B.'s security was merged, and C. the first incumbrancer; and by his bill C. offered to redeem if the Court should hold B.'s security still subsisting and prior to his. This bill was dismissed at the hearing, A. being still living. After the death of A., G. W. filed his bill for an injunction to restrain C. from bringing ejectment, on the ground that the order of dismissal had determined the right of G. W. to the estate. *Held*, that such bill could not be sustained, for that the order of dismissal in the former suit could only have proceeded on the ground that there was no equity to deprive G. W. of the benefit of the term of ninety-nine years determinable on the death of A., which was vested in his trustee, and did not decide who was the rightful owner of the estate. — *Waine v. Crocker*, 421.

See DAMAGES, 2.

DIVIDEND. See REFUNDING.

DOCUMENTS.

An order having been made for production of books of account relating to

the traffic of a railway company, with the usual liberty for the plaintiff, "his solicitors and agents," to inspect, peruse, and take copies, the plaintiff's solicitor went to inspect them, accompanied by a professional accountant, who was the auditor of a neighbouring railway company. *Held*, that the connection of the accountant with the other company made him an improper person to inspect the books, and that the plaintiff ought not to have introduced him.

* Whether the accountant was an agent within the meaning of the * 791 order, *quære*. — *Draper v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 23.

See SOLICITOR.

DOUBLE PROOF. See REFUNDING.

DOUBTFUL TITLE. See VENDOR AND PURCHASER.

EAST INDIA STOCK. See INVESTMENT.

ELECTION. See MARSHALLING.

EQUITABLE MORTGAGE. See MORTGAGE.

EQUITY. See ACCOUNT.

EQUITY TO A SETTLEMENT. See HUSBAND AND WIFE.

EVIDENCE.

A purchase by a solicitor from a client having been set aside on the ground that the sufficiency of the consideration was not established, an inquiry was directed with a view to ascertain whether the purchase-money was paid. No evidence was adduced on the inquiry to prove the payment, except the acknowledgment in the body of the deed and the usual indorsed receipt. It appeared that no further evidence could be had, and that there was no reason to suppose that any evidence had been destroyed. *Held*, that the acknowledgment and receipt were not sufficient evidence as against parties claiming under the client, and that the purchase-money must be considered not to have been paid.

The client devised all his real estates in such manner that the plaintiff was entitled in tail in remainder expectant on a life-estate. The plaintiff by his bill, which impeached the purchase by the solicitor, offered to confirm certain sales of minerals which had been made by the solicitor after the death of the client. *Held*, that the plaintiff, having adopted the sales of the minerals, could not claim to be entitled *in præsentia* to the moneys arising from them on the ground that the working mines was an act of waste, but was entitled to them only after the death of the tenant for life. — *Gresley v. Mousley*, 433.

See STAMP.

EXAMINATION. See BANKRUPT.

EXECUTION. See BANKRUPT.

EXECUTORS.

A testator, after directing payment of his debts, funeral and testamentary expenses, and legacies, bequeathed some legacies to charities, and gave to three persons legacies of nineteen guineas each, and appointed them executors. He then bequeathed "the whole of his * estate * 792

and effects whatsoever and wheresoever absolutely " to the same three persons by name, their executors and administrators, " charged nevertheless, and he thereby charged " certain parts thereof with certain payments, which did not nearly exhaust the estate ; and he declared that all costs, charges, and expenses which his executors or any of them should incur might be retained by them out of any moneys which might come to their hands from any part of his estate. The testator died in 1837.

Held, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls, *dissentiente* the Lord Justice KNIGHT BRUCE, that the executors took the residue, not beneficially but as trustees, and that it belonged to the next of kin.

Per the Lord Justice TURNER, whether the Statute 11 Geo. 4 & 1 Will. 4, c. 40, did not prevent the executors from taking beneficially, *quære*.—*Saltmarsh v. Barrett*, 279.

See LACHES. VENDOR AND PURCHASER. WILL, 9.

EXECUTORY DEVISE. See COPYHOLD.

EXONERATION. See MORTGAGE, 2.

EXPENSES. See VENDOR AND PURCHASER.

FACTOR. See MARSHALLING.

FEME COVERT. See HUSBAND AND WIFE. LUNACY, 1.

FINE. See COPYHOLD.

FINES AND RECOVERIES ACT. See TRUST.

FIXTURES.

A mortgage of a silk mill, with the steam-engines, boilers, steam-pipes, main shafting, mill gearing, millwright's work, and all other machinery whatsoever, being, or which should thereafter be, on the lands described in the mortgage. *Held*, as against a second mortgagee, not to be confined to machinery necessary for giving power to the mill as being *ejusdem generis* with the specified particulars, but to extend to silk-spinning machines, resting by their weight only on the ground, but attached by movable bolts to iron rods fixed to mill beams overhead. — *Haley v. Hammersley*, 587.

FOREIGN LAW. See JURISDICTION.

FOREIGN SOVEREIGN. See INJUNCTION.

FRAUD. See EVIDENCE. LACHES.

* 793 *FRAUDS, STATUTE OF. See HUSBAND AND WIFE.

FURTHER CONSIDERATION. See VENDOR AND PURCHASER.

GUARDIAN. See LUNACY, 1.

HOTCHPOT. See LEGACY.

HUSBAND AND WIFE.

1. A married woman being equitable tenant in tail in remainder of an undi-

vided share in lands to be purchased with a sum of trust money, she and her husband joined in mortgaging her interest. The fund was misappropriated. Proceedings having been taken for its recovery, the husband and wife succeeded in obtaining the restitution of her share of the fund, which was brought into Court, with arrears of interest since the time when her estate came into possession. The mortgagee did not concur in any steps to recover this share. The husband, when the mortgage was made, was maintaining his wife, but had become a bankrupt before her interest came into possession, and was uncertificated.

Held by the Lord Justice TURNER, the Lord Justice KNIGHT BRUCE doubting, that the wife had no equity to a settlement out of the capital, nor, as against the mortgagee, out of the future income of the fund.

But *held*, that the mortgagee had no claim to the arrears of income of the mortgaged property, which he had taken no steps to recover, and that the assignees of the husband could only take subject to the wife's equity to a settlement, and that the whole arrears ought to be settled. — *Life Association of Scotland v. Siddal. Cooper v. Greene, 271.*

2. A married woman living apart from her husband, and having separate estate, carried on trade. After the death of her husband, tradesmen who had supplied her with goods in her trade filed a bill against her and her trustees for an account of her separate estate, and payment out of it of their demands for the price of the goods. Pending the suit, she mortgaged the property which had been her separate estate for valuable consideration, to an extent exceeding its value.

Held, by the Lord Justice KNIGHT BRUCE, that the dealings with the tradesmen were not such as to give them any remedy against the property which had been the separate estate, and by Lord Justice TURNER, that there would have been a remedy, but that the mortgage had taken it away.

Semble, per Lord Justice TURNER, —

That the separate estates of married women are bound by their
* debts, obligations, and engagements, contracted with reference * 794
to and upon faith or credit of those estates.

That whether they were so contracted is to be judged of by all the circumstances of the case.

That when a married woman having separate estate, and living apart from her husband, contracts debts, the Court will impute to her the intention of dealing with her separate estate. — *Johnson v. Gallagher, 494.*

3. A person who advanced to a deserted wife money to enable her to supply herself with necessaries, has no demand, enforceable at law, against the husband for the advances, but has a remedy in equity against him for so much of the money as is actually applied by the wife in paying for necessaries. *Held*, accordingly, where a plaintiff who had deserted his wife filed his bill to enforce a judgment against real estate of the defendant, that the defendant was entitled to set off the amount of sums which before and after the judgment had been advanced by the defend-

ant to the wife for the purpose of providing her with necessaries, and had been applied by her for that purpose.

May v. Skey, 16 Sim. 588, overruled. — *Jenner v. Morris*, 45.

4. When the Court is called upon to establish or act upon a trust of lands, it must not only be manifested and proved by writing signed by the person by law enabled to declare the trust that there is a trust, but it must also be manifested and proved by writing signed as above what the trust is.

Where an equitable estate in fee descended on a married woman, the Court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate by curtesy of her husband could not be interfered with.

A settlement of the personal estate of an intestate directed in favour of a married woman, who was his sole next of kin, though her husband, being his administrator, could obtain possession of it at law. — *Smith v. Matthews*, *In re Matthews Settlement*, 189.

See LUNACY.

IMPLICATION. See WILL, 6.

INCOME. See LEGACY.

INDIA. See INSOLVENCY.

INFANT.

Although the Court will not allow an infant's suit to proceed which is not for the infant's benefit, it ought not, in making a decree for accounts in such a suit, to direct an inquiry whether any benefit has accrued to the infant from the * suit, so as to make the answer to that inquiry depend on the result of the accounts.

* 795

Where an administration suit had been instituted by an infant, on which accounts had been directed and property secured, but the suit appeared not to have been instituted with the view of benefiting the infant, the Court gave the next friend no costs up to the decree. — *Clayton v. Clarke*, 682.

INJUNCTION.

1. The defendant Kossuth, a Hungarian refugee, caused to be manufactured in England a large quantity of notes, which, though not made in imitation of any notes circulating in Hungary, purported to be receivable as money in every Hungarian state and public pay office, and to be guaranteed by the state of Hungary. The plaintiff, as King of Hungary, sued to have these notes delivered up and to restrain the manufacture of any such, alleging that the issue of such notes would injure the rights of the plaintiff by promoting revolution and disorder, would injure the state by the introduction of a spurious circulation, and would thereby also injure the plaintiff's subjects.

Held, that, although the Court has not any jurisdiction to restrain the commission of acts which only violate the political privileges of a foreign sovereign, the manufacture of these notes ought to be restrained.

Per the Lord Chancellor: A foreign sovereign may sue in this country for a wrong done to him by an English subject, unauthorized by the English government, in respect of property belonging to that foreign sovereign, either in his individual or his corporate capacity, or to his subjects, and the circulation of spurious notes purporting to be guaranteed by the nation, is such a wrong.

Per the Lord Justice TURNER: The plaintiff, as representing his subjects, was entitled to relief on account of the pecuniary injury which a spurious circulation would inflict on them; but *quære*, whether he would have been entitled to relief on the ground of the loss arising to the state from such spurious circulation—the issue of such notes being, so far as such loss only was concerned, a mere invasion of the prerogative of a foreign sovereign and the political rights of his subjects. — *The Emperor of Austria v. Day and Kossuth*, 217.

2. A lease of a farm contained a covenant on the part of the lessee against alienation or parting with possession without the lessor's assent, and a condition for re-entry in that event, whether occurring by act of the lessee, or by operation of law. The lessee became bankrupt. On a bill filed by the lessor, alleging that the assignees had elected to take the lease, and were about to assign it and to part with the possession without the lessor's * assent, that the farm was within a short distance of the lessor's residence, and that it would cause personal annoyance to the lessor if the farm were assigned to a person not approved by him: *Held*, that a sufficient case of mischief was not made out to support an interlocutory injunction. — *Dyke v. Taylor*, 467.

See ACCOUNT. CHURCH BUILDING ACTS. DAMAGES, 1, 2. DISMISSAL. LEASE. RAILWAY ACTS.

INSOLVENCY.

An order was made in 1849 for winding up an abortive association for obtaining a railway Act. P., one of the shareholders who had not been put upon the list of contributories, obtained in India, in 1853, a discharge under the Indian Insolvent Act, 11 & 12 Vict. c. 21. In his schedule, filed in pursuance of that Act, he did not refer to his liability under the winding-up order, nor in any way refer to the railway scheme. In 1858, having returned to England, he was put on the list of contributories.

Held, by the Lord Chancellor and the Lord Justice TURNER, the Lord Justice KNIGHT BRUCE doubting, that the omission in the schedule did not prevent the discharge from having the same effect as a bankruptcy certificate in England.

Held, also, that where a company has come to an end before the bankruptcy of a shareholder, the certificate discharges him from all liability to contribute to debts, and also from all liability to contribute to the expenses of winding-up, and that he ought not to be put on the list of contributories. — *In re Warwick and Worcester Railway Company. Parbury's Case*, 80.

INSPECTION. See DOCUMENTS.

INSPECTORSHIP. See STATUTE OF LIMITATIONS.

INTERESSE SUO. See COPYHOLD.

INTERPLEADER.

A bill of interpleader filed at the record and writ clerks' office together with an affidavit of no collusion: *Held* not demurrable on the ground that the affidavit was not actually annexed by sealing, tying, or other mechanical means to the bill. — *Shepherd v. Jones*, 56.

INVESTMENT.

The Court will not, in the absence of special circumstances making the increase of the income of a tenant for life beneficial to those entitled in remainder, authorize the transfer of a fund from consols into another investment authorized by 23 & 24 Vict. c. 38, and producing a larger income,

* 797 * where such transfer is likely to cause a loss to those entitled in remainder.

Where therefore the tenant for life of a fund in Court petitioned to have it transferred from consols into East India stock, being a redeemable stock, the market price of which was at the time considerably above par, and no special circumstances were alleged to show that the consequent increase of the petitioner's income would be beneficial to her children, who were entitled in remainder: *Held*, that such change of investment ought not to be ordered. — *Cockburn v. Peel*, 170.

JOINT-STOCK COMPANY. See CHAMBERS. INSOLVENCY. WINDING-UP ACTS.

JUDGE. See CHAMBERS.

JOINT AND SEPARATE. See PARTNERSHIP.

JUDGMENT.

The priority as against lands in Middlesex of a judgment registered in the Middlesex registry over a judgment which, though earlier in date, is later in order of registration on the Middlesex registry, is not lost by reason of the judgment creditor's having notice of such earlier judgment at the time when his judgment is entered up. — *Benham v. Keane*, 318.

JURISDICTION.

Although a purchaser to whom land out of the jurisdiction of the Court has been agreed to be sold by a person within the jurisdiction, may sue him for a specific performance of the agreement, or may possibly enforce a lien for money paid by the plaintiff on account of the price, he cannot sue here a third person to whom the vendor has afterwards sold the property, although such third person had notice of the former contract, there being no privity of contract between the two purchasers.

Nor will the Court interfere if the matter is the subject of litigation in a foreign Court which has means of deciding upon and enforcing the rights of the parties. — *Norris v. Chambers. Chambers v. Norris*, 583.

See ACCOUNT. INJUNCTION, 1. LUNACY, 3.

LACHES.

1. A testatrix gave a share in her residuary estate in trust for her daughter for life, with remainder to the daughter's children, and if none attained twenty-one (which happened), as she should appoint generally.

In 1821, the daughter, without any legal advice except * that of * 798 the acting trustee, who was a solicitor, and was under the will interested in the residuary estate, appointed that certain debts due from her husband to the testatrix should be accepted as part of the daughter's share. Her husband became soon afterwards bankrupt, and died in 1853, and she died in 1858, having, in settlements of accounts with the trustees, from time to time proceeded on the footing of the deed: *Held*, that a bill filed by her representatives in 1859, to set aside the deed, on the ground of the appointment being a dealing between trustee and cestui que trust to the advantage of the former and prejudice of the latter, under undue influence and without independent advice, was too late. — *Skottowe v. Williams. Williams v. Skottowe*, 535.

2. A testator had mortgaged a leasehold brewery, and covenanted to pay the mortgage debt. By his will he bequeathed legacies and an annuity, and made a residuary devise and bequest. His son, to whom he bequeathed the equity of redemption in the brewery, carried on the business, and kept down the interest on the mortgage for thirteen years, and then (in 1856) became bankrupt. In the mean time the estate of the mortgagor had been administered by the executors, and the legacies paid and annuity kept down. In 1857, the mortgagee's representatives instituted a suit for the administration of the testator's estate, and payment of the balance of the mortgage debt (if any) which the proceeds of the mortgaged premises might be insufficient to satisfy. The mortgaged premises, having become depreciated, were sold for less than the debt, and the balance was certified to be due from the executors, and was ordered to be paid by them, but they were unable to pay it, whereupon, in 1860, the mortgagee's representatives filed a bill to have the mortgagor's residuary real estate applied in payment of his debts, so far as it would extend, and to compel the legatees and annuitant to refund. The residuary devisees had mortgaged their "portions, shares, and interests as residuary legatees and executors of and in the moneys to arise from the sale of" the testator's residuary real and personal estates: *Held* —

1. That the lapse of time and intervening circumstances were a sufficient answer to the suit, so far as it sought to call on the legatees and mortgagees to refund.
2. That the mortgage made by the residuary devisees was subject to the payment of the testator's debts. — *Ridgway v. Newstead*, 474.

LANDLORD AND TENANT. See **INJUNCTION.** **LEASE.**

LAST EXAMINATION. See **BANKRUPT.**

* **LEASE.**

* 799

Coal and iron works were demised, together with lands and mines under other lands not included in the demise, with liberty to the lessees to make and "use roads and ways" over any of the lands, and to do

all such other acts upon the lands as should be necessary for the purposes of the works, and the lessees covenanted to uphold and keep in good repair the furnaces and other works, houses, and other buildings then standing and which during the term should be erected and built on the demised land and all other the demised premises, and at the expiration of the term to deliver up the property and "all ways and roads in, upon, or under the same lands" in such good order that the works might be continued by the lessor. *Held*, that this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, and that the landlord therefore was not entitled to an injunction to restrain the tenant from disposing of them during the term. — *Duke of Beaufort v. Bates*, 381.

See INJUNCTION. PARTNERSHIP. SETTLED ESTATES ACT. VENDOR AND PURCHASER.

LEGACY.

1. A bequest of the sum of 2000*l.* Long Annuities standing in the name of the testatrix, who had only 300*l.* of that stock, held to be specific and not demonstrative, and to fail as to the deficiency. — *Gordon v. Duff*, *In re Ward*, 662.
2. A person who was a shareholder in and manager of a company, bequeathed some of his shares specifically to several persons absolutely, and gave the residue of his property to tenants for life, with remainders over. After his death it was discovered that large sums were due from him as manager to the company, and a compromise was entered into with the sanction of the Court, by which his estate was to pay the company 220,000*l.*, a considerable part of which was attributable to interest accrued during the testator's life on the sums due from him. Immediately after the payment the company disposed of this sum by declaring a bonus on its shares.

Held, that the whole of the bonus on the shares specifically bequeathed belonged to the specific legatees.

Held, also, that, as between the tenants for life and remainder-men, the whole of the bonus on those shares which formed part of the residue belonged to the tenants for life as income.

Figures used by a testator in a hotch-pot clause, held to be merely used for the sake of giving an example to explain what the testator understood by hotch-pot. — *Maclaren v. Stainton*, 202.

See LACHES. WILL.

* 800 *LEGAL ESTATE. See VENDOR AND PURCHASER, 3.

LETTERS-PATENT. See PATENT.

LEVEL. See RAILWAY.

LIEN. See MARSHALLING.

LIMITATIONS. See STAMP. STATUTE OF LIMITATIONS.

LORD. See COPYHOLD.

LUNACY.

1. The wife of a lunatic was the sole surviving trustee of a sum of stock.

An order was made, appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock. — *In re Thomas Wood, In the Matter of the Trusts of the Will of George Story*, 125.

2. Where a defendant is of unsound mind, not found so by inquisition, and the plaintiff applies for the appointment of a guardian *ad litem*, the practice is to appoint the solicitor to the suitors' fund; but if the application be made by the family of the defendant, this practice does not prevail, and any suitable person may be appointed. — *Charlton v. West*, 156.
3. There is no jurisdiction in lunacy to confirm a report made after the lunatic's death approving of an arrangement entered into by the committee in his lifetime. Whether, if the report had been made in the lunatic's lifetime, it could have been confirmed after his death, *quære*. *In the Matter of Way*, 175.

See MORTGAGE, 2.

MACHINERY. See **FIXTURES**.

MANOR. See **COPYHOLD**.

MARRIED WOMAN. See **HUSBAND AND WIFE**. **LUNACY**, 1.

MARSHALLING.

The plaintiffs, who were cotton-spinners, employed a commission agent to sell their goods, and the course of business was for the agent to obtain the assent of the plaintiffs to each sale. The agent transmitted to the plaintiffs the particulars of certain sales which he represented as having been made to specified purchasers, and afterwards rendered accounts debiting himself with the purchase-moneys, but not paying the balance. He afterwards made an arrangement with his creditors, when it appeared that his representations as to his disposal of the goods were untrue, and that he had in fact consigned the goods for sale as and with goods of his own to factors in India, and that the account * had been settled between him and the * 801 factors on the footing of debiting each cargo only with the advances and charges made in respect of that cargo, but that on the whole account there was a balance coming from the factor: *Held*, —

1. That the plaintiffs were entitled to have the proceeds marshalled, and the advances and charges thrown entirely on the agent's own goods.
2. That this right was not excluded by the settlement of accounts between the plaintiffs and the agent, or by the former having had upon the agent's books the means of discovering the fraud before a meeting took place of his creditors, at which the plaintiffs attended, and at which a deed of arrangement was agreed to, but at which neither the fraud, nor the claim founded on it, was brought forward. "Means of knowledge" to affect a person with constructive notice must be such as a prudent man might be expected to avail himself of.

3. That the right was not excluded by the mode in which the factors had rendered their accounts to the agent, or by their not having themselves set up any claim to marshal the proceeds of the consignments.
4. That the enforcement of this right did not preclude the plaintiffs from proving under the deed of arrangement for the deficiency. — *Broadbent v. Barlow*, 570.

METROPOLIS MANAGEMENT ACTS. See CHURCH BUILDING ACTS.

MIDDLESEX. See JUDGMENT.

MINES. See EVIDENCE.

MISTAKE. See RECTIFICATION.

MORTGAGE.

1. On a suit instituted by the assignees of a bankrupt mortgagor for payment of the surplus of the proceeds of the mortgaged property which had been sold by transferees of the mortgage: *Held*, that the transferees were entitled to tack a debt insufficiently secured by a previous mortgage of other property made to them directly, although they took the transfer after and without notice of the bankruptcy. — *Selby v. Pomfret*, 595.
2. Real estate, subject to a mortgage, descended upon a lunatic. By an order made in the lunacy, the mortgage was paid off out of the lunatic's personal estate, without prejudice to the question how it should ultimately be borne. The lunatic afterwards died intestate. *Held*, that the amount ought to be raised out of the real estate and paid to the administratrix as personalty. — *In the Matter of Leeming*, 43.

See LACHES. FIXTURES. SHIP.

* 802 * NECESSARIES. See HUSBAND AND WIFE.

NEPHEWS. See WILL, 5.

NEXT FRIEND. See INFANT.

NEXT OF KIN. See WILL, 2.

NOTICE. See JUDGMENT. MARSHALLING. VENDOR AND PURCHASER.

OFFICIAL MANAGER. See CHAMBERS.

OPTION. See DEMURRER.

PAROL. See HUSBAND AND WIFE.

PARTIES.

- To a bill seeking a declaration that a purchaser by a solicitor for an annuity charged on his client's estate was made with the client's money, or that the client was entitled to the benefit of the purchase and for consequential relief, registered judgment creditors of the client were held on a plea not to be necessary parties, although part of the relief sought by the bill could not be obtained in their absence. — *Ford v. Tennant*, 697.

PARTNERSHIP.

1. There is no rule that where lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate; nor, on the other hand, that if they are not bought for the purposes of the partnership business they are not joint estate; nor does the form of the conveyance settle the question, which must be determined with reference to all the circumstances of the case.

One of two partners carrying on the business of leather factor bought lands for the purpose of erecting a residence on part of it and selling the remainder to a railway company. He offered a share to his partner, who was also desirous of building a house out of town for his residence. The offer was accepted and the purchase-money paid out of the partnership assets; but the conveyance was to the partners in separate moieties, each of which was conveyed to the usual uses to bar dower. The partners at their individual expense built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partnership assets: *Held*, that the whole of the land constituted joint estate.

The commissioner having held * that part of the land was joint and * 803 part separate estate, there was an appeal as regards the latter part within time, and then another appeal as to the former part after the statutory time: *Held*, that the second appeal was a cross appeal, and that a cross appeal may be entered after the statutory time if the original appeal is in time. — *Bank of England's Case. Ex parte McKenna. In re Laurence*, 645.

2. Slight circumstances are sufficient to prove a contract between creditors of a dissolved firm and continuing partners, that the debts due from the former shall become debts due from the latter. Therefore where a new firm, consisting of two of the partners of a dissolved firm of three, sent a circular to the creditors of the three stating that the debts of the three would be paid by the two, and creditors of the three sent to the two, accounts, debiting them with debts due from the three: *Held*, that the creditors were entitled to prove not only these, but the other debts of the three against the two. — *Ex parte Chaninell*, 752.

3. A partner in a firm deposited with the bankers of the firm, who were also his private bankers, the certificates of some railway shares which he had purchased in his own name, with a memorandum to the effect that the object of the deposit was to secure a sum of money therein described to be then due from the partner to the bankers, and any future sums in which he might become indebted to them. The firm as between themselves and the partner, adopted the purchase of the shares, and from time to time made payments on account of the sum which was by the memorandum expressed to be due from the partner. The moneys advanced upon the security were employed for the purposes of the firm: *Held*, that on the firm becoming bankrupts, and the banker discovering the above state of circumstances, it did not, nor did the general lien of the bankers, entitle them to hold the shares as

a security for the balance due from the firm. — *City Bank Case. Ex parte McKenna. Re Laurence*, 629.

PATENT.

Where a person objecting to the grant of letters-patent for an invention, had not seen any notice of the application for the letters-patent till after the sealing of the warrant for sealing them: *Held*, that he was entitled to oppose before the Lord Chancellor, and the matter was referred back to the Attorney-General. — *In the Matter of Brennard's Patent*, 695.

See ACCOUNT.

PAYMENT. See EVIDENCE.

PAYMENT OUT OF COURT. See RAILWAY COMPANY.

PIRACY. See INJUNCTION.

* 804 * **PLEA.**

Although a demurrer for want of equity to one bill may be a good plea to another bill, yet where the plaintiff's title to relief depends not on the construction of an instrument but on facts and circumstances, if the allegations in the two bills are different, such a plea cannot be sustained. — *Marchioness of Londonderry v. Baker*, 701.

POWER OF SALE. See VENDOR AND PURCHASER.

PRACTICE.

1. After a decree for administration of a testator's estate had been made at the suit of a mortgagee of the share of one of the residuary legatees, the same residuary legatee made another mortgage of his share by a deed, in which the plaintiff concurred, and by which it was agreed that the two incumbrances should rank *pari passu*. An order on further consideration was then made, without bringing the new incumbrancer before the Court. *Held*, that he might be brought before the Court by supplemental order, under 15 & 16 Vict. c. 86, § 52, without a supplemental bill. — *Freeman v. Pennington*, 295.
2. Certificate of counsel for rehearing allowed to be signed by one counsel only. — *Knowles v. Greenhill, Heath v. Greenhill*, 712.

See CHAMBERS. COPYHOLD. DOCUMENTS. INTERPLEADER.

PRE-EMPTION. See DEMURRER.

PREMISES. See WILL, 8.

PRESUMPTION. See EVIDENCE.

PRIORITY. See JUDGMENT.

PRIVILEGE. See BANKRUPT.

PRODUCTION. See DOCUMENTS.

PROOF.

Where a debt, which has been proved against a firm in this country, was subsequently proved, under a *concordata* in a foreign country, against another firm, consisting of some of the members of the English firm: *Held*, that the Court ought not to order the dividends received on the latter proof to be refunded. — *Ex parte Mellor*, 760.

See MARSHALLING.

PROTECTION. See BANKRUPTCY.

RAILWAY ACT.

1. Where a special railway Act provided * that the line should be made * 805 according to the levels shown on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street: *Held*, that the latter provision was not obligatory, and did not prevent the company from carrying their line across the street according to the provisions of the general Act. — *The Warden and Assistants of the Harbour of Dover v. The London Chatham and Dover Railway Company*, 559.
2. By a clause in a railway Act, after reciting to the effect that the proposed line skirted the sea and would obstruct the traffic between the sea and the lands on its shore, and so deprive the lands of their natural advantages of position as respected the sea, and that the lands abounded with minerals, which in some cases belonged to persons not owners of the surface, and were well situated for manufactories and other purposes of commerce, and that it was desirable to give facilities of access between the lands and the sea, and from the sea and the lands on the seaward side of the line to parts inland: it was enacted to the effect that the owners or occupiers of any lands, manufactories, or mines, lying near or adjoining the railway, and in parts adjacent, might at any time make any railways across the railway (not crossing it on a level) and use them "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require." A neighbouring land-owner proposed to construct a railway on his own land and to carry it under the company's railway, and to use it as a public railway for general traffic: *Held*, that he was entitled so to do, and that the clause in the Act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighbouring lands. — *Hughes v. The Chester and Holyhead Railway Company*, 352.
3. When a deposit has been paid into Court under the standing orders of Parliament in respect of several undertakings comprised in one bill, and the bill is subsequently withdrawn as to some only of the undertakings, the promoters cannot, upon certificate of such withdrawal, procure at once the payment out of Court of so much of the deposit as is attributable to the abandoned undertakings. — *In the Matter of the Aberystwith and Welch Coast Railways*, 201.

RECEIPT. See EVIDENCE.

RECEIVER. See COPYHOLD.

RECTIFICATION.

Prior to an agreement for a resettlement of lands, they stood limited, * subject to certain powers vested in the plaintiff, and certain * 806 charges for the plaintiff's own benefit, and for the jointure of the plaintiff's wife, and for portions of his younger children, to the plaintiff for life, with remainder to his only son in tail male, with remainder to trustees for 1600 years in trust, in the event of failure of male issue of

the plaintiff, to raise a sum of 100,000*l.* for additional portions of the plaintiff's daughters.

In contemplation of the marriage of a son of the plaintiff's son, the plaintiff and his son entered into the arrangement for resettlement, whereby it was agreed that the plaintiff's son should disentail the reversion, and limit the estates after the plaintiff's decease, subject to his life-interest and powers, and to the exercise thereof, and all subsisting charges, to such uses as the plaintiff and his son should appoint, and that the plaintiff and his son should then appoint the lands in remainder, and subject as aforesaid to the use of the plaintiff's son for life, with remainder to the plaintiff's first and other sons successively in tail male, with remainder to a nephew of the plaintiff and certain other nephews successively for their lives, with remainder to the first and other sons successively in tail, with remainders over. A deed of resettlement was made in pursuance of this agreement, and thereby the lands were appointed after the plaintiff's death; and subject to his life-estate and to the powers thereto annexed, and of the jointure and any other charge upon the estates to which the plaintiff might be entitled, to the use of the plaintiff's son for life, with remainder to his first and other sons successively in tail male, with remainder to the plaintiff's nephews successively, and remainder over. The plaintiff and his solicitor deposed that neither of them intended by the proposals or settlements to displace the term of 1500 years or the portions of 100,000*l.* thereby secured, except so far as was necessary for the benefit of the plaintiff's son and his issue, but it did not appear that any discussion took place on the subject, or that it was mentioned: *Held*, not a case for reforming the resettlement. — *Elwes v. Elwes*, 667.

REFERENCE. See AWARD.

REFORMING. See RECTIFICATION.

REFUNDING.

Two firms, one composed of A. and B., the other of A., B., and C., carried on business at Liverpool and Pernambuco, respectively. An English adjudication of bankruptcy was made against A. and B., and the holder of a bill drawn by A., B., and C., on A. B. proved under it and received a dividend. Afterwards A., B., and * C. failed in Pernambuco, and the same creditor proved and received dividends on his bill under that liquidation: *Held*, that he ought not to receive any further English dividend without refunding the Brazilian dividends, but could not be ordered to refund the English dividend already received. — *Ex parte Mellor*, 760.

See LACHES.

REGISTRY. See JUDGMENT.

REINVESTMENT. See DEFENCE OF REALM ACT.

RELATIONS. See WILL, 2.

RELEASE. See CREDITORS' DEED.

REMAINDER. See LEGACY. WILL, 6.

REPAIR. See LEASE.

REPURCHASE. See DEMURRER.

RESCINDING. See REVERSION.

RES JUDICATA. See DISMISSAL. PLEA.

REVERSION.

The vendor of a contingent reversionary interest in bank-stock and real estate at a price calculated by the purchaser upon statements of the value of the real estate made by the offer to sell, having filed his bill to set aside the sale as being made at an undervalue: *Held*, that although as a general rule the *onus* lies on the purchaser of a reversion to show that he gave a fair value, yet where the vendor has stated in his proposals the value of the *corpus* of the property, it lies upon the vendor to allege and prove that the value was understated.

Per the Lord Justice TURNER, *semble*, a sale of a reversion at a price calculated according to tables in common use cannot be set aside merely on the ground that another set of tables in common use would give a higher value.

The purchasers bought taking bank-stock at 200*l.* per cent. The then market price was 215*l.*, and the average market price for the last eleven years 217*l.* These facts were held not to be conclusive evidence of purchase at an undervalue, there being strong evidence to show that, in the opinion of actuaries, it was reasonable in the purchase of a reversion to treat bank-stock as only worth 200*l.*

Costs of selling real estate are to be regarded in valuing a reversionary interest in the sale moneys. — *Perfect v. Lane*, 369.

* ROYALTY. See ACCOUNT.

* 808

SALE. See JURISDICTION.

SAVINGS BANK. See WINDING-UP ACTS, 2.

SCOTLAND. See STATUTE OF LIMITATIONS.

SECURITIES. See INVESTMENT.

SECURITY FOR COSTS. See COSTS.

SEQUESTRATION. See STATUTE OF LIMITATIONS.

SETTING ASIDE DEED. See LACHES. REVERSION.

SET OFF. See TRUST.

SETTLED ESTATES ACT.

A testator in his lifetime entered into contracts for leases of parts of his estate for building purposes. The contracts provided for granting separate leases of the houses when built, apportioning the whole ground-rent among some of them, and leaving the rest to be demised at a peppercorn rent. He devised the estate in strict settlement, without any power under which the leases could be granted: *Held*, that the Act for facilitating leases and sales of settled estates could not safely be resorted to for granting these leases. — *Cust v. Middleton*, 33.

SETTLEMENT, EQUITY TO. See HUSBAND AND WIFE.

SHARE. See LEGACY, 2.

SHIP.

The mortgagees of a ship took possession, and forthwith commenced employ-

ing her in a hazardous and speculative business. During the course of this employment, which was throughout a losing one, they put her up for sale under depreciating conditions, and no sale having been effected, continued to run her some weeks longer in a reckless manner till she was much depreciated in value, and then sold her for a small sum. Vice-Chancellor STUART made a decree charging the mortgagees in account with the value of the ship and fittings at the time when they took possession of her, and placing matters on the same footing as if they had bought her at that time: *Held*, by the Lord Chancellor and Lord Justice KNIGHT BRUCE, that this decree was correct; *dissentiente* the Lord Justice TURNER, who was of opinion that the proper form of decree would have been to charge the mortgagees * with what the ship might have earned if chartered in the ordinary course, and with all damage beyond ordinary wear and tear occasioned by their employment of her.

* 809

The questions as to the right of a mortgagee of a ship to employ her considered. — *Marriott v. The Anchor Reversionary Company*, 177.

SOLICITOR.

The non-delivery of documents left by an insolvent solicitor with counsel and law-stationers, and retained by them for non-payment of fees and charges: *Held*, not a breach of an order upon the solicitor to deliver up to a new solicitor all deeds and documents in his possession or power relating to the affairs of his client in the suit. — *Re Williams*, 104.

See EVIDENCE. TAXATION. TRUSTEE ACT.

SPECIFIC LEGACY. See LEGACY.

SPECIFIC PERFORMANCE. See JURISDICTION. VENDOR AND PURCHASER.

STAMP.

A debtor sent to one of the persons beneficially interested under the will of his creditor a promissory note insufficiently stamped for the amount of the debt, with a letter referring to the note as being for the money due: *Held*, that the letter was not of itself a sufficient promise or acknowledgment to exclude the operation of the Statute of Limitations, and that the note could not be received in evidence for the purpose of explaining it, that being a direct and not a collateral purpose.

Leave given, on an application *ex parte*, to set down a petition of appeal where the appellant was not a party to the cause. — *Parmiter v. Parmiter*, 461.

STATUTE OF FRAUDS. See HUSBAND AND WIFE, 2.

STATUTE OF LIMITATIONS.

A sequestration had issued against a debtor in Scotland, where he resided and carried on business, and creditors (also residing in Scotland) proved and received dividends under the sequestration. The debtor did not obtain any order of discharge, and more than six years from the payment of the last dividend, he petitioned the Court of Bankruptcy in London for protection, having in the mean time carried on business in England, and a proposal for payment of a composition secured by

inspectorship trusts was assented to and confirmed according to the provisions of the Bankrupt Law Consolidation Act, 1849: *Held*, that the Statute of Limitations was a valid objection to the claim of * the Scotch creditors to be paid a composition on the unpaid * 810 portion of their debt under the inspectorship, the sequestration being held not to create a trust of subsequently acquired property for the purpose of taking the debts provable under it out of the statute. — *Ex parte Kidd, In the Matter of Kidd*, 640.

See STAMP. TRUST.

SUBSTITUTION. See WILL, 7.

SUCCESSION DUTY.

A capital fund was formed by subscriptions upon lives, each subscriber subscribing upon the life of a nominee. The income was yearly to be divided ratably among those subscribers whose nominees were then living, and as soon as the number of nominees was so far reduced by death that the capital would give not less than 1000*l.* for each share, the fund was to be divided among the subscribers whose nominees were living. The capital became divisible after the passing of the Succession Duty Act: *Held*, that no succession duty was payable.

Per the Lord Justice TURNER, *semble*, succession duty would have been payable but for the saving in the 17th section of the Act.

Per the Lord Justice TURNER, the 17th section is not confined to cases where the relation of debtor and creditor exists between the parties, but extends to every case of a contract *bonâ fide* for valuable consideration in money or money's worth for the payment of money or money's worth after the death of another person. — *Oldfield v. Preston*, 398.

SUPPLEMENTAL ORDER. See PRACTICE, 1.

SUVIVOR. See WILL, 6.

TAXATION.

N. acted as solicitor of J. from 1833 to 1857, and during that period received and paid large sums of money on his account. In November, 1853, N. delivered to J. his account current from 1833 to that time, and in it took credit for twenty-seven bills of costs, which he delivered at the same time. N. afterwards, in February, 1857, and June, 1857, delivered continuations of his accounts, taking credit in them for subsequent bills of costs, which were delivered along with the accounts in which they were included. None of the accounts were ever settled. In July, 1857, the relation of solicitor and client was determined, and J. placed the matter in the hands of a fresh solicitor. In March, 1858, the last account was * delivered, with another bill of costs. In April, * 811 1858, J. presented a petition for taxation of all the bills, showing considerable items of overcharge: *Held*, that a taxation of all the bills ought to be directed, though most of them had been delivered more than twelve months before the petition was presented. — *In re Nicholson*, 93.

TENANT FOR LIFE. See LEGACY.

TIME. See DEMURRER. LACHES.

TRAM-ROAD. See LEASE.

TONTINE. See SUCCESSION DUTY.

TRUST-DEED. See CREDITORS' DEED. STATUTE OF LIMITATIONS.

TRUST.

Semble, where a trust is definite and clear, a *cestui que trust* will not be held to have sanctioned a breach of trust merely on the ground that while his interest was reversionary he knew of the breach of trust and did not interfere.

A trustee of real estate devised his real estate to G. T., subject to the payment of a legacy, so that the trust estate did not pass. G. T., however, acted as trustee: *Held*, that she must be deemed a trustee upon an express trust, and that the Statute of Limitations was therefore no defence to a claim against her estate in respect of a breach of trust.

G. T. improperly allowed part of the trust fund to be received by B. N. the tenant for life. S., one of the reversioners, borrowed money from C. and mortgaged to him her share in the trust funds. B. N. at the same time gave C. a bond and a mortgage of other property for the same debt, B. N. being a surety for S. in this transaction. The debt having been paid out of B. N.'s estate: *Held*, that G. T.'s representative could not claim to have this payment set off against the claim of S. in respect of the misapplied part of the trust fund.

Money was held in trust to be invested in the purchase of land, to be settled so that S., a married woman, would have been equitable tenant in tail in remainder. The money was improperly received by the tenant for life, who bought with it freeholds and copyholds in his own name. After this S. and her husband joined in mortgaging her interest in the trust funds and the lands to be purchased with them, and a fine was levied to the use of the mortgagees. After this the * purchased freeholds and copyholds were declared by decree to belong to the trust. *Held*, that as regarded the copyholds the security was invalid as against S., but good as against her husband.

* 812

An estate stood limited, subject to a life-estate, to five persons as tenants in common in tail, with cross remainders between them in tail. One of these five persons, a married woman, concurred with her husband in a deed mortgaging her fifth share and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue, and the deed contained a covenant to levy a fine of the property expressed to be conveyed by the deed. A fine was levied, purporting to extend only to the fifth share. Afterwards one of the other tenants in tail died without issue and without having barred his estate tail. *Held*, that there was an error in the fine, which was cured by 3 & 4 Will. 4, c. 74, § 7, and that the fine was effectual as to one-fourth, and not as to one-fifth only. — *Life Association of Scotland v. Siddal. Cooper v. Greene*, 58.

See HUSBAND AND WIFE. INVESTMENT.

TRUSTEE.

1. C. and T. were trustees of a will. T. was also the sole trustee of a settlement wholly unconnected with the will. T. had misappropriated a sum of stock, part of the settlement fund. The *cestuis que trust*, who had been informed by him that it had been invested on mortgage, pressed him to replace it. He thereupon induced C. to concur in transferring into the sole name of him, T., a like sum of stock, part of the trust funds under the will, and executed to C. a transfer of a mortgage in fee for securing the amount. He then informed the *cestuis que trust* under the settlement that their fund was properly invested in stock in his name, and they thereupon placed a *distringas* upon the fund which had been transferred to him as above. They had no notice that the stock did not arise from an investment of their own trust funds. T. afterwards died insolvent, and it was then discovered that the mortgage deed was a forgery. The stock being still in the name of T., C. filed a bill against the *cestuis que trust* under the settlement, to obtain a transfer to himself of the stock, on the ground that it still belonged to the funds under the will.

Held by the Lord Chancellor and the Lord Justice KNIGHT BRUCE, that however the case might have stood if the *cestuis que trust* under the will had been the plaintiffs (as to which their lordships gave no opinion), C. could not claim to have the fund retransferred.

Per the Lord Justice TURNER, *quære*, whether the trust in favour of the persons entitled under the will could be defeated while the * stock * 813 remained standing in T.'s name, and he continued to be a trustee of the will; and *quære*, whether C., in his character of trustee, was not entitled to maintain a suit to have this trust enforced, though he had been guilty of a breach of trust in concurring in the transfer to T. — *Case v. James*, 256.

2. Where a trust-deed for the benefit of creditors is avoided by a bankruptcy, the Court of Bankruptcy may allow the trustees' costs out of the estate. — *Ex parte Tomlinson*, 745.

See LACHES. LUNACY, 1.

TRUSTEE ACT.

The *cestuis que trust* under a deed, the trustee of which was a solicitor, presented a petition in the matter of the solicitor and in the matter of the Trustee Act, alleging that the trustee had taken the benefit of the Insolvent Acts, had repudiated the trusts, refused to discharge his duties as trustee, and otherwise misconducted himself in the trusts, and praying the appointment of a new trustee in his place and a vesting order. The trustee denied or offered explanations of the various imputations against him, claimed a balance to be due to him, and objected to being removed from the trusteeship. An order was made by the Vice-Chancellor according to the prayer of the petition.

Held, on appeal, that the 32d section of the Trustee Act does not give the Court jurisdiction under the Act to displace a trustee who is desirous of continuing in the trust.

Held, also, that the trustee could not, under the summary jurisdiction of the Court over solicitors, be removed from the trust for acts done by him, not in the character of solicitor or in any relation immediately arising out of that character, but in the character of trustee, and that the order could not be sustained. — *In re Blanchard. In the Matter of the Trusts of LeDoulcet's Mortgage Deed*, 131.

UNDERTAKING. See DAMAGES, 2.

UNDUE INFLUENCE. See LACHES.

UNDERVALUE. See REVERSION.

UNSOUND MIND. See LUNACY.

VALUATION. See DAMAGES, 1.

* 814 *VENDOR AND PURCHASER.

1. An estate was put up for sale by a particular describing it as "now or late in the several occupations of H. R. and others," and by one of the conditions, it was provided, that on completion, the purchaser should be "let into the receipt of the rents and profits." Some parts of the property were subject to leases for lives, at a low rent. *Held*, that a purchaser, who entered into the contract without knowing of the existence of such leases, could not be compelled to take the title without compensation.

A claim for specific performance raising no question of notice or waiver having been filed by the vendor, and a reference as to title in the common form having been made, the order directing which was not appealed from: *Held*, by the Lord Justice KNIGHT BRUCE, that proof of notice to the purchaser of the existence of the leases for lives when he entered into his contract, and proof of subsequent conduct from which a waiver of the objection might be inferred, would not take away his right to compensation.

Per the Lord Justice TURNER, whether the question of a purchaser having waived his right to compensation may not be entered into upon further consideration, though not raised by the pleadings, *quære*. — *Hughes v. Jones*, 307.

2. A testator, after directing his debts to be paid by his executrix, gave his real and personal estate to her for life, and if she found the rents not sufficient for her maintenance and comfort, he gave her full power to mortgage the real estate so far as should be needful for her maintenance and comfort. *Held*, that the question, whether the executrix could sell the real estate for payment of debts, was too doubtful for the title to be forced upon a purchaser. — *Cook v. Dawson*, 127.
3. By the conditions of sale of the property of a company in the course of being wound up, it was stipulated that the purchaser should accept a conveyance from the official manager under the powers of the Winding-up Acts, 1848 and 1849, or one of them, without requiring the

concurrence of any of the shareholders or any other person; but that, if the purchaser should consider the legal estate outstanding and should require a conveyance thereof, he should bear the expenses of obtaining such conveyance or conveyances as he might require, and all other expenses incident to getting in such legal estate. *Held*, on the general scope of the conditions, that the purchaser was to be at the risk of getting in the legal estate, and that the vendor was entitled to a specific performance on executing a conveyance * of the equitable * 815 interest, and undertaking, at the expense of the purchaser, to obtain all such conveyances and render all such assistance to the getting in of the legal estate as the purchaser should require and as the vendor was able to obtain or give. — *Sheerness Well or Waterworks Company v. Polson*, 36.

See JURISDICTION.

VESTING. See LUNACY, 1. WILL, 7.

VESTRY. See CHURCH BUILDING ACTS.

WAIVER. See VENDOR AND PURCHASER.

WASTE. See EVIDENCE.

WIFE. See HUSBAND AND WIFE.

WILL.

1. A testatrix by her will directed her fortune to be divided between A. and R. K., appointing trustees for R. K. to pay him half-yearly his share. By codicil, reciting that A. was dead, she desired that her fortune should be divided between R. K. and T. K. for the use of their children, and when they came of age to be settled upon them, share and share alike. R. K. survived the testatrix, and died without ever having had a child. *Held*, that the gift to him by the will of a moiety was absolute, and that the modification introduced by the codicil affected it so far only as was necessary to give effect to the disposition in favour of his children, and that this disposition having failed, the absolute gift remained, so that his personal representatives were entitled to his moiety. — *Norman v. Kynaston*, 29.

2. A testator gave real estate to trustees upon trust to pay a moiety of the rents to his wife for life, and the other moiety for the maintenance of his daughter, and after the wife's death he gave all the estate to his daughter in fee, provided that if the daughter should die without lawful issue, the wife her surviving, then he gave the estate to his wife for life, and after her death "to my relations, share and share alike." He died almost immediately after making his will, and his daughter was his only child. She died without issue in the lifetime of the wife.

Held, that "relations" meant next of kin, and that the period of ascertaining them was not to be postponed till the death of the widow; but whether they were * to be ascertained at the death of the * 816 testator or of the daughter, *quære*.

Per the Lord Chancellor, the death of the daughter was the period for ascertaining them. — *Lees v. Massey*, 113.

3. A testator gave his residuary real and personal estate upon trust out of the income to pay an annuity to his widow for life, and after her death he directed that the trustees should hold the proceeds of the trust property in trust to divide them among his children, on their attaining twenty-one ("with full power of maintenance and advancement" in the mean time) and the issue of such children if dead, and in case there should be no child of the testator living at his death, upon trust for such persons who "at the failure or determination of the preceding trusts" would be entitled under the Statute of Distributions as his next of kin to the trust estate if he had "then died possessed thereof intestate and without leaving any wife" him surviving. *Held*, that the sole next of kin living at the time of the testator's own death was the person entitled under the ultimate bequest. — *Fletcher v. Fletcher*, 775.
 4. A will directed that all legacies should be paid within six months after the testator's death. By a codicil, executed on the day of the testator's death, after giving 500*l.* apiece to five of the grandchildren of his brothers by name, he bequeathed 500*l.* to legatees thus described: "each child that may be born to either of the children of either of my brothers, lawfully begotten." *Held*, that of the children of the brothers' children neither those born at the date of the codicil nor those begotten after the testator's death were entitled, but only children *en ventres leur mères* at the date of the codicil and of the testator's death. — *Townsend v. Early*, 1.
 5. A bequest in trust for the testator's nephews and nieces "on both sides" held to extend to children of his wife's brothers and sisters. — *Frogley v. Phillips*, 466.
 6. A testator devised real estate to his four granddaughters for their respective lives in equal shares, "remainder in four equal shares to the use of the children of my said four granddaughters and the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors or survivor of such children and the issue of their, her, or his body in tail, and in default of issue of my said granddaughters, I give the same estate to E. S.," &c. Three of the four granddaughters died unmarried. The fourth married and had a son (the plaintiff) and a daughter (the defendant). *Held*, that his son and daughter became entitled to the whole estate in moieties as tenants in common in tail.
- * 817 *Per* the Lord Justice TURNER: "the limitations to "the survivors or survivor of such children" only created cross-remainders as between children of a granddaughter taking their mother's share, but, by reason of the ultimate gift over, cross-remainders in tail as to the entire fourths were to be implied between the children of the grandchildren, the previous express limitation of cross-remainders not being a conclusive reason against such implication. — *Atkinson v. Barton*, 339.
7. A testator gave a fund to his wife for life, and after her death to his seven sons and daughters, or such of them as should be living at the death of his wife, and the issue of such of them as should be then dead leav-

ing issue, share and share alike, the issue not to take larger shares among them than their respective parents would have been entitled to if living. One of the testator's sons who survived him died in the lifetime of the widow, leaving a child, who afterwards also died in the lifetime of the widow: *Held*, by the Lord Justice TURNER, affirming the decision of the Vice-Chancellor STUART, that the child took a vested interest, and that her representative was entitled to a share of the fund. — *In re Pell's Trusts*, 291.

8. A testator empowered his trustees, out of the funds from time to time coming to their hands under the trusts thereinbefore contained, to expend such sums or sum of money as they should deem expedient in the repairs, and improvements, and insurance against fire of any of the messuages and other buildings, lands and hereditaments hereby devised, and, if they should think proper, to permit the person who might, under the trusts, be entitled to a life or other greater estate in the respective portions of the estates to occupy "the mansion-house, gardens, and premises," without paying any rent or compensation for the same, and without such person being obliged at his expense to keep the same in repair, or being at any other expense than paying the rates and taxes: *Held*, upon the context of the will, and having regard to surrounding circumstances, that the tenant for life was entitled under this trust to occupy a park surrounding the mansion, and to have the vineries and forcing pits kept in repair, and the gardens kept stocked with plants, shrubs, and trees, at the expense of the trust estate. — *Lethbridge v. Lethbridge*, 523.
9. A legacy "to my friend J. S., of M., banker's clerk, and one of the executors of this my will," *held* not conditional on the acceptance of the office of executor. — *In re Denby*, 350.
10. A testator gave the income of his residuary estate of his wife for life and the capital equally among his children who should be living at his death, but directed that if * any daughter married, the interest of her share should be paid to her for her separate use for her life, and after her death to her husband for his life, and after the death of the survivor equally among their children; and if the daughters had no children living at their respective deaths, the principal of their portions to be at their own disposal: *Held*, that the event of a daughter's marrying was not to be restricted to a marriage in the lifetime of the widow. — *Wytham v. Wytham*, 758.

See EXECUTORS. LEGACY. LEGATEE. VENDOR AND PURCHASER, 2.

WINDING-UP ACTS.

1. A solicitor, who was a shareholder in an incorporated company, knowing it to be in difficulties, transferred his shares to his farm bailiff, a man without property. The transfer purported to be made for 50*l.*, but no such sum was ever paid, nor had the transferee ever agreed to pay any sum. The transferor admitted that he had made the transfer to get rid of his liability, and had asked the transferee to take the shares off his hands. He also stated that he had informed the transferee (who

had no other advice) that the company was in difficulties; that the shares were worthless, and that a liability might attach to the ownership. The transferee stated that he had never looked upon himself as owner; that he had always considered that the shares were merely put into his name to serve some purpose of the transferor's, and that he had always understood that he should be indemnified. The company having been ordered to be wound up, the transferor, as solicitor of the transferee, but without communication with him, made an offer to contribute a sum towards the debts of the company, to escape all further liability. He admitted that this sum was to have come out of his own pocket: *Held*, affirming the decision of the Master of the Rolls, that the transfer must be held to have been merely colourable, and that the transferor was a contributory.

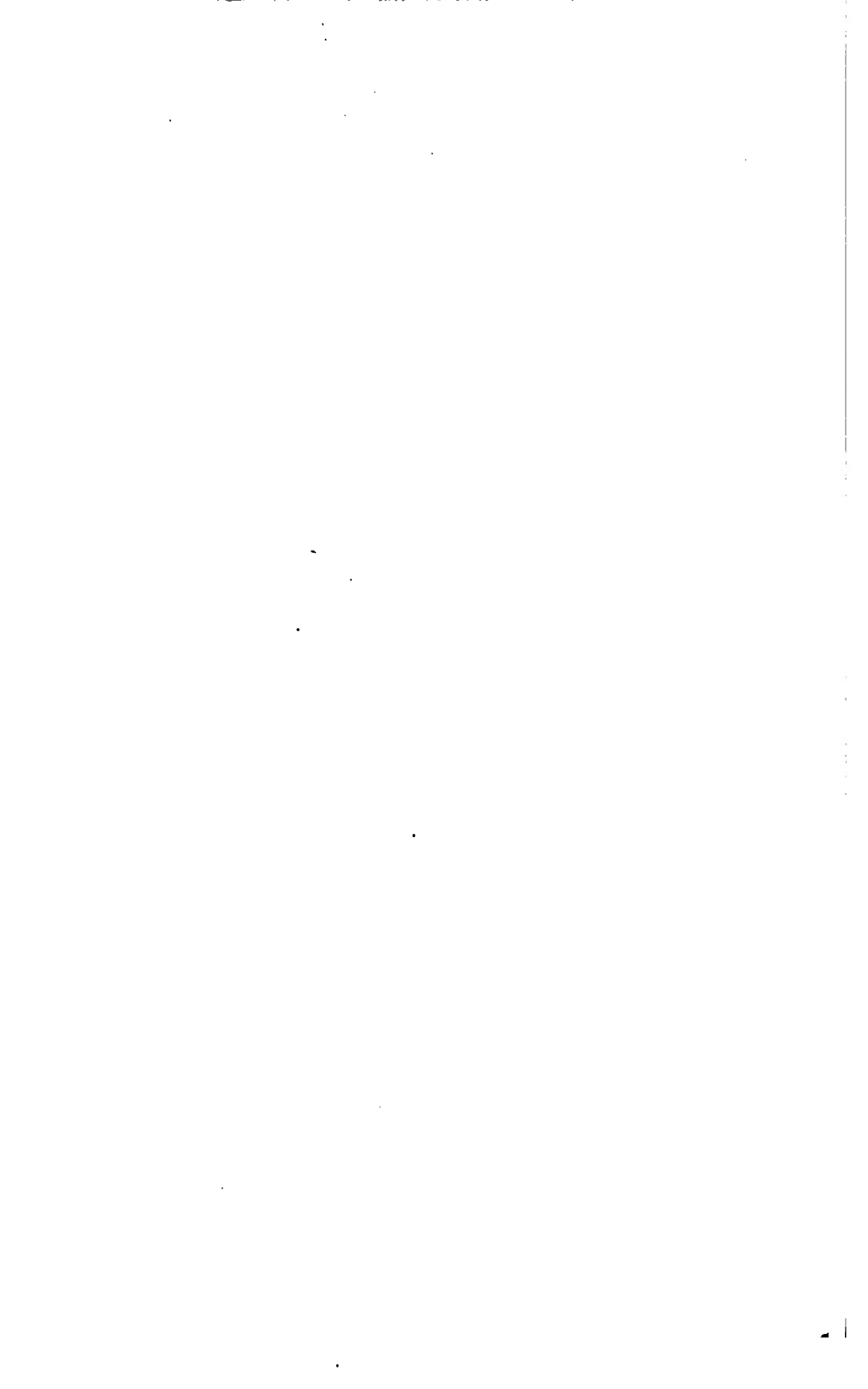
An appeal motion by a contributory to have his name taken off the list being refused with costs as against the official manager, the creditors' representative, who appeared, though not served, was allowed his costs out of the estate. — *In re the Electric Telegraph Company of Ireland. In re Budd's Case*, 297.

2. A company called "The District Savings Bank," was registered in 1858 under the Joint-stock Companies Act, 1856, with limited liability, but was never registered under the Acts of 1857 and 1858 relating to banking companies, and its shares were of 1*l.* each. Its objects were to receive deposits, * to grant loans on security, and to conduct the business of emigration agents. Money could not be drawn out by checks payable on demand, but could only be withdrawn after notice, and the company kept banking accounts with two banks in London: *Held*, that it was not a banking company within the meaning of the Acts relating to such companies, and that the Court of Chancery had no jurisdiction to make an order for winding it up. — *Ex parte Coe, Re District Savings Bank*, 335.

See CHAMBERS. CONTRIBUTORY. INSOLVENCY.

[642]

END OF THE THIRD VOLUME.





Stanford Law Library



3 6105 062 783 753

